UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IN RE SEPTEMBER 11TH LITIGATION,

21 MC 97

----------x

New York, N.Y.
June 14, 2007
10:15 a.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

MOTLEY RICE
Attorneys for Plaintiff
BY: DON MIGLIORI
MICHAEL E. ELSNER
BY: GREGORY P. JOSEPH LAW OFFICES, LLC
Attorney for Plaintiff

FLEMMING ZULACK WILLIAMSON ZAUDERER, LLP
Attorneys for Plaintiff
BY: RICHARD A. WILLIAMSON

CLIFFORD LAW OFFICE
Attorneys for Plaintiff
BY: TIMOTHY S. TOMASIK

U.S. DEPARTMENT OF JUSTICE
Attorneys for Plaintiff
BY: BETH GOLDMAN
SARAH SHEIVE NORMAND
JEANNETTE VARGAS

AZRAEL GANN & FRANZ, LLP
BY: KEITH S. FRANZ

KREINDLER & KREINDLER, LLP
Attorneys for Plaintiff

BY: MARC MOLLER

CONDON & FORSYTH, LLP
Attorneys for Defendant
BY: DESMOND T. BARRY, JR.

DEBEVOISE & PLIMPTON, LLP
Attorneys for Defendant
BY: ROGER E. PODESTA

SIMPSON THACHER & BARTLETT, LLP
Attorneys for Defendant
BY: JOSEPH F. WAYLAND

O'MELVENY & MYERS, LLP
Attorneys for Defendant
BY: MARK WOOD

PERKINS COIE, LLP
Attorneys for Defendant
BY: MARY P. GASTON
MACK H. SHULTZ

QUIRK AND BAKALOR, P.C.
Attorneys for Defendant
BY: JEFFREY J. ELLIS

(Case called)

THE COURT: Good morning. Please, be seated.

I want to thank Mr. Barry and Mr. Moller for helping organize the activities today, and we will follow the agenda that has been distributed. There are four main issues about which we will have discussion.

The first, whether federal law pre-empts state law concerning the standard of care applicable to the aviation defendant's conduct.

The second, whether punitive damages are available.

The third, whether aviation defendants should be able to discover from the government preSeptember 11th intelligence and other threat information known to the government but not conveyed to the aviation defendants.

And fourth, whether Pennsylvania law should apply to United Airlines flight number 93 compensatory damages claim.

Those are the four issues. Have we missed anything that someone else has raised in motions?

There will be no time limits. We will discuss each issue in turn until the discussion has been completed.

Sometimes the hearer of a discussion completes his hearing before the transmitter of information completes the transmission, and if there is that dichotomy we will try to deal with it as best we can.

On the first issue having to do with the standard of

care, Mr. Podesta for the aviation defendants will speak first. Ms. Gaston for Boeing will speak second. Mr. Wood for the airport operators will speak third. Now, I think much of what Mr. Wood would probably be covering will be covered by Mr. Podesta and Mr. Joseph will speak for the plaintiffs.

As you know this judge has a bit of impatience in argument and has the habit of cutting in and entering into dialogue before the presenter may be finished. I'll try to discipline myself more than usual this morning.

Mr. Podesta, there's lot of people here. I don't know how adequately the room is mic-ed. If anyone in the back can't hear, please, raise your hand. We will raise our voices, but I want everyone here to be able it to hear and pay attention.

Mr. Podesta.

MR. PODESTA: Good morning, your Honor.

Roger Podesta, for American Airlines on behalf of the aviation defendant's motion for determination of the federal aviation security regulations established the standard of care governing their conduct on 9/11. I'd like to reserve with the Court's permission a couple of minutes for rebuttal.

THE COURT: We will have interchange. There is no time limits. We will leave that to the Court of Appeals. They have lights.

MR. PODESTA: I will try to focus my argument on a few key highlights and rely on my colleagues and the briefing for

most of the points. I don't want to argue so long that Judge Griesa starts knocking on the door.

The main theme for my argument this morning, your Honor, is that the issue before you on this motion is essentially one of statutory interpretation. And its interpretation not so much of the Federal Aviation Act but of the Stabilization Act or ATSSA Congress specifically created for purposes of the 9/11 litigation.

And even more precisely the issue is what did Congress mean when it wrote in Section 408 B 26 ATSSA that the substantive law for its new federal cause of action was to be derived from the law of the state where the crash occurred unless such law is inconsistent with or pre-empted by federal law.

Now, plaintiffs tend to read Section 408 B 2 as if the sentence stopped with the words "where the crash occurred" and attribute little significance to the remainder of the sentence.

They argue that inconsistent with is just another way of saying conflict pre-emption and that there is no preemption here at all because the federal regulations only establish minimum standards. But we submit that that ignores the basic principal. Then in construing statutory language courts ought to strive to give meaning to every word in the statute.

And under that cannon of construction the worlds inconsistent with and pre-empted by should each be given

independent meaning. And I would suggest that plaintiff's position also fits poorly both the text of Section 408 B 2 and the context of the enactment of the Stabilization Act.

When you look at it the phrase pre-empted by inconsistent with or pre-empted by is a uniquely powerful combination of terms. As far as the parties research has revealed Congress had never once used that combination of terms inconsistent with or pre-empted by in any federal statute prior to 9/11.

THE COURT: It seemed to me, Mr. Podesta, that the latter phrase raises an issue of intent. On the former phrase raises an issue of logical inconsistency. That is to say if it was the intent of a particular statute and perhaps regulation to pre-empt state law. That is expressive of an intent by Congress to supersede state law by federal law. The issue raises congressional intent and the supremacy clause. The phrase inconsistent with would suggest that the operation of a state statute or common law standard would be inconsistent with the federal standard. Again, the issue is the supremacy clause of the Constitution. But it's a feature other than specific intent and it then goes beyond normal pre-emption law which normally takes in both standards but deals with a first inconsistent with as a suggestion of the second congressional intent. Here they're made independent.

MR. PODESTA: I would say that the pre-emptive by

language refers to the normal pre-emption principles which are both expressed and implied occupation appealed and conflict pre-emptions and inconsistent with is really an expansion of those concepts in the operation and that what really -- inconsistent with is really stating, inconsistent with is a softer word than conflict or direct conflict.

THE COURT: I think your point is that it connotes something more than normal pre-emption.

MR. PODESTA: Yes, that is correct.

THE COURT: That the ATSSA is intended to have a more inclusive effect superseding state law more than would otherwise be the case in normal pre-emption analysis.

MR. PODESTA: That's correct. If Congress wished to confine the analysis under this statute simply to the traditional principals of expressed or implied pre-emption it could simply have said pre-empted by. But it said inconsistent with pre-empted buy. And to my way of thinking, the way I read the English language that involves a less lower level of conflict between the federal and state interests is required for federal law to control than it would be if it were purely a conflict pre-emptive issue and I think when you look at the text of the statute derived from state law --

THE COURT: Let's say you've persuaded me of this point, let's move on and see where it goes.

MR. PODESTA: All right. Then I would say if Congress

puts those words inconsistent with or pre-emptive by I think it is hard to avoid the conclusion that in drafting that language Congress must have intended that there was some body of state law that would apply and some aspects of state law that would be displaced.

THE COURT: Not necessarily. It could be hypothetical. It could be an expression of Congress that if there is a straight standard that is inconsistent with the ATSSA that state law won't be applied.

MR. PODESTA: That, hypothetically, that hypothetical possibly possibility exists. But Congress I think I'll try to persuade you that Congress was aware that there was an extensive body of federal regulations in the aviation security industry.

THE COURT: I think everyone will agree that there is extensive occupation in the field by Congress.

MR. PODESTA: And I would think that it's also logical to conclude that if Congress meant to displace, to adopt any body of federal law it would be the detailed aviation security regulations such as the ACSSP the cog and the provisions of the Federal Aviation Act. I suggest that if you step back from the statutory language and forget about the verbiage of the brief what the statute is really saying and being -- is where state and federal law cover the same subject matter and the state law is appreciably different than the federal, then the state law

yields to the federal and the federal controls.

THE COURT: Mr. Podesta, I think the trouble with urging that point and persuading me of that point is it's too general, and as a judge I really occupy the position of an educated layman. I don't know the term. I don't know the specific areas. I don't know the techniques and the technique of the legislation, so I would like you as an experienced lawyer in this area to lead me through it. I take your first point. There is something more in ATSAA than normal pre-emption analysis but I am anxious to see where that goes.

MR. PODESTA: All right. I think one key clue to what Congress meant is the situation in which it was acting on 9/11. Congress obviously wanted to centralize all of the 9/11 litigation in a single court and it could only do that by citing a federal forum, but it had a problem. There are several Supreme Court decisions that is pointed out serious constitutional issues with Congress, just taking stated court cases and bringing them into a federal court under a purer jurisdiction statute. So in order to avoid the constitutional issues Congress had to create a federal cause of action that gave rise to another problem.

There is no preexisting federal common law of torts to which Congress could readily make reference. So what it decided to do, rather than create its own new body of federal tort law from scratch, was to borrow the pre-existing body of

state authority law from the law of the state of each crash. But I suggested it didn't disregard the federal regulatory scheme, but what the last phrases of Section 48 B 2 really are saying is that where there is pre-existing federal law on point there is no need to borrow from the state common law and federal law controls over the state law.

Now, I'd suggest that that is the most logical interpretation of what Congress was doing, but I am sure the plaintiffs will say where is your proof?

THE COURT: Mr. Podesta, I have to say you I want to step back from your point as well. We don't know what Congress had in mind because the legislative history of ATSSA is sparse to nonexistent. So we take the statute and we try to understand what the words say and mean and how far they may be applied. It is quite possible and I think probable that the legislators had in mind standards of care that customarily are addressed by the common law of the several states. And the overlay of extensive regulation in the federal statutes and regulations book and would depend on the courts to bring those several bodies together and make sense of them, noting the federal supremacy, particularly, in the breath of the wording that we discussed a few minutes ago. But dealing with standards of the common law as well as the regulatory book. That's how I would approach the subject.

MR. PODESTA: I think the common law standard is

basically one of reasonableness and I think what Congress is saying in the last clause is where there is a federal regulation that told the aviation defendants what they were supposed to do. That is the reason. That supplies, answers the questions what is reasonable under state law in the circumstances of the federal regulatory --

THE COURT: I would say it provides answers but it may not answer.

MR. PODESTA: All right.

THE COURT: I'd like to move from the abstract to the actual. I'd like to deal with the specific federal statutes and regulations that may be applicable here and look at their text and see if we can apply the ATSSA their text.

MR. PODESTA: All right. But I would just like to make one more point and that relates to the Price Anderson Act.

Congress had faced an identical problem.

THE COURT: Price Anderson Act for those who may not know is the congressional regulation that deals with the atomic energy developments in the 1960s, in particular. I don't remember the date of the statutes.

MR. PODESTA: These are the 1988 amendments. This is Congress's final solution to the problem. In the Price Anderson Amendment Acts Congress created, as it did in that statute, an exclusive federal cause of action and provided that the substance of the federal cause of action for nuclear power

plant accidents was to be derived from the law of the state where the accident occurred except where that law was inconsistent with federal law. And because of the sparseness of the legislative history I can't point to something and say Congress specifically considered this but think of this as if it were a federal case. I don't have an eyewitness that would say the Price Anderson Act was present at the creation of the Stabilization Act.

THE COURT: It was a model.

MR. PODESTA: I've got something better. I've got effective the statutory DNA of the Price Anderson Act is present in the Stabilization Act that you look at the structure and language of the two statutes they're too strikingly similar for that to be a mere coincidence and Congress also had before it on 9/11 --

THE COURT: It also has similarities of function and purpose. The Price Anderson Act reflected Congressional concern that a catastrophe resulting from a nuclear accident would ruin the industry and by the threat of a ruination prevent proper development and investment in the field and so Congress entered it with schemes of federal insurance and the statute that you discussed. And I would take your point and agree with it that it is a model that can be persuasive.

MR. PODESTA: There is an important nuance on that and that is that Congress when it puts new language in the federal

statutes is presumed to be aware of how that language that has previously been interpreted by the courts.

THE COURT: I accept that as well.

MR. PODESTA: And as of 9/11 there was a unanimous body of federal judicial opinions consisting of four different federal circuit courts and at least 12 district courts including Judge Cote in this district who had held that the words inconsistent with in the Price Anderson Amendment Act established an exclusive federal standard of care for assessing the liability of nuclear power plant operators. And the courts have also held that that standard of care was to be provided by the regulations of the nuclear energy regulatory commission, and that the issue in Price Anderson in that case is, did the defendants comply with the provisions of the statute and the nuclear energy commission regulations? If so there is no liability.

In other words, the common law standard of reasonableness is converted into compliance with the nuclear energy regulatory commission regulations where there is a nuclear energy regulatory commission regulation on point. And that was the unanimous interpretation from four circuits and Judge Cote as of the date Congress modeled the Stabilization Act on the Price Anderson Act Amendment.

But let's move into the area of some specific examples of inconsistencies and possible direct conflicts. I am

focusing on and inconsistent with. That really reflect the allocation of my argument with my colleagues. I certainly endorse the pre-empted by arguments but I know Mary is going to cover a lot of them and I --

THE COURT: Mr. Podesta, I would like you to occupy the field.

MR. PODESTA: Okay. Unfortunately, I think Mr. Joseph is going to carve out an area that's not pre-empted for himself.

But in our opening brief we provided numerous examples of what the aviation defendants were required to do under the federal aviations and compared them to what the plaintiffs' theories of liability appear to be insofar as we can determine them from the questions that the plaintiffs were asking our witnesses at their depositions.

For example, plaintiffs appear to suggest that the aviation defendants should have given special scrutiny to the persons and the carry on baggage of CAPPS selectees.

THE COURT: Sorry. Say again.

MR. PODESTA: CAPPS. The computer had a number of factors who determine the trying to select passenger who were perceived as above high risk and over the years there was a variety of FAA regulations telling the aviation defendants what they were supposed to do with these CAPPS selectees. And it's important here because I believe nine or ten of the hijackers

were cab selectees. And plaintiffs are basically contending that the common law of the states where the crash occurred required the airlines and the screening companies to give special scrutiny to the persons and the carry on bags of CAPPS selectees.

Beyond that you would be given to a normal passenger. In other words, you open every bag, hand wand or pat-down every selectee. Now, the problem with that analysis is that it's flatly inconsistent with the security directives that were in place for CAPPS selectees on 9/11.

As of 9/11 the standard was set forth in security directive -- I think it is a 9701, they all have these catchy titles -- and that basically said that the only special scrutiny that a CAPPS selectee was to receive on 9/11 related to the checked baggage of the cab selectee, not to his person, not to her carry on bags. They were all otherwise except for their checked baggage same scrutiny as other passengers were to receive.

There was good reason for that. It was largely a product of the views of the Gore commission that basically was concerned about ethnic, racial or religious profiling in selection of passengers for screening. And it also is premised on the assumption that the FAA and the Gore Commission both made that the biggest threat was explosives, particularly, in checked baggage because that had been the problem with Pan Am

and was thought to have been the problem with TWA flight 800 at the time these regulations took effect. So plaintiffs here there have a direct inconsistency here.

THE COURT: Mr. Podesta, take me through the language, please. I want to see the regulations. I want to you walk me through the regulations. First, show me the special scrutiny point and the general scrutiny point. I think that this is extremely important -- and this a word to the rest of you -- it's extremely important to work with the precise text of the language that we're dealing with any analysis or inconsistency has to deal with text and expressions.

(Pause)

MR. PODESTA: Well, this is to the easiest thing to do live because the attachment that we're referring to is Exhibit C to -- Exhibit D. I'm sorry -- to Mr. Barry's initial affidavit.

Do you have it in front of you?

THE COURT: We will have it in a minute.

(Pause)

THE COURT: What is the regulation.

MR. PODESTA: Security direct 9701, security directive and I don't think this is consist have the same binding affect as FAA regulations.

THE COURT: This is a regulation issued by the Department of Transportation, October 27, 1997.

MR. PODESTA: Yes. And although this particular one expired March 1988. In fact, successors continued it through September 11, 2001.

THE COURT: This is the one in effect as of September 11, 2001.

MR. PODESTA: That's right. And this is for CAPPS.

THE COURT: I noticed the TSA redactions.

MR. PODESTA: Yes. Well, that's an issue we frequently have. But I think we can take you through the meaning and I think probably for purposes of this argument make sense to look at the revision summary and in the first page and it says in the first paragraph this security --

THE COURT: I don't know if there are any reporters here who want to have the benefit of this information, but my staff will work with you afterwards to allow you to see the information that may not be readily available to you to get the story straight.

MR. PODESTA: You'll see first bullet point, your Honor, says this security directive allows for the use of an FAA approved computer assisted passenger screening CAPPS system to profile passengers. And the very second bullet point requires profiling of only, in bold face, those passengers checking baggage.

THE COURT: It doesn't say the checked baggage. It says the passengers checking bags.

MR. PODESTA: That's right. Then if you turn to the third page it talks about actions required by U.S. carriers and then it goes through the requirement of a profile and then it says, A, the checked baggage belonging to a passenger is identified as selectee using CAPPS shall be cleared using one of the procedures outlined in section four. Then it goes on --

THE COURT: So what I understand from this is that the focus is on the checked baggage.

MR. PODESTA: Correct.

THE COURT: Your point is that the experience at Lockerbie and other places showed dangers and risks in the checked baggage.

MR. PODESTA: Yes. And this is confirmed by the findings of the Kane Commission which said that the only effect of the CAPPS profiled select system on 9/11 was as to checked baggage and I think it is like page 846 the Kane Commission interpreting those regulations that CAPPS selectees on 9/11 were to be subject to no special scrutiny for their persons or for their carry on bags.

But there are many other examples that I can give you, your Honor, of inconsistencies between what they think the plaintiffs are claiming.

THE COURT: Let's talk about this. This has a certain degree of force. What is the force of a security directive?

MR. PODESTA: A security directive has the affect of a

federal aviation administration regulations. It has the binding effect of law and that was also noted by the Kane Commission in their report. It is to be distinguished from an information circular which simply provides the aviation defendants with information about possible terrorist threats but doesn't require them to do anything.

THE COURT: Now, you read this, Mr. Podesta, and I think it is a fair reading of it, that this is an instruction to those responsible for checking people coming into the airplanes, that if a person exceeds the profile and therefore is a potential security risk, the focus of attention should be on the baggage and not on the person.

MR. PODESTA: Checked baggage.

THE COURT: And not on the person or the hand carry baggage. So this is what the instruction is, it's binding instruction. It instructs everyone. I'll put a hypothetical to you. Those responsible for security are concerned about a risk and suspect a certain person. Are they forbidden to have a more rigorous review of that person, inspection of that person and that which he carries than they would do if you or I assuming we are boring persons go through a checkpoint.

MR. PODESTA: It would depend. The answer is as a general matter under the federal regulations all passengers are to be given the same degree of scrutiny. Only exception is for CAPPS --

THE COURT: They say all persons other all categories of persons? I put the question --

MR. PODESTA: They talk generally about persons passing through the screening checkpoint.

THE COURT: Is a checker forbidden to have a more rigorous inspection?

MR. PODESTA: I would say that there is an element, of course, of common sense in the federal regulations which doesn't mean they're superseded by state law standards, but if someone comes in and is acting dramatically suspicious is intoxicated or says I have a bomb or starts being belligerent and fighting with people, obviously, the screener would have the authority to take a special look at that person.

THE COURT: Do we know and can we say publicly what it was about nine of the ten people that made them more suspicious?

MR. PODESTA: I can say publicly.

THE COURT: Let me talk to you about that for a moment. There is a precise issue that can be drawn here. It's wrong to profile people by racial type or ethnic type, perhaps, other forbidden categories. But it makes sense when you are suspicious about a person -- than his ethnic or her ethnic make up to have a more rigorous standard. Do we have to know in this case what were the bases of suspicion about these nine people?

MS. GOLDMAN: The perhaps selection process is computer generated selection process, so it wasn't man made. It was done by the computer. So I think that that plays --

THE COURT: In other words, there were criteria that if noticed would have raised suspicion about these nine people.

MS. GOLDMAN: Correct.

THE COURT: And are the criteria based on mannerisms, can you say, or are they based on matters that various among us with consider improper profiling characteristics?

MS. GOLDMAN: I'll start by explaining that the CAPPS criteria themselves that I think your Honor understands are SSI and that's why we're not discussing what they are.

THE COURT: Sensitive security information.

MS. GOLDMAN: But your Honor should understand that the CAPPS program was submitted to the Department of Justice for review to ensure that it was not a violation of any civil rights laws by putting it into place, and I think that's probably what I can say right here. This is an issue that is going to be, I think, an element of discussion among the parties in discovery. So it may be premature for us to give you factual information at this point about the nature of this but --

THE COURT: I think we have crossed that, Mr. Podesta.

MR. PODESTA: I would note, your Honor, that the CAPPs selection is a computer system. It has nothing, whatsoever, to

do with how the passengers behaved when they presented themselves on the airport because the computer has no way of knowing how they are conducting themselves, and there is also a random selection. So some people are selected for no run reason at all other than we want to select a random election and others are selected because of their particular information about them in the computer.

THE COURT: What can you say about these nine people in terms of how they presented themselves, whether they were noted as designees under CAPPS, whether their baggage was scrutinize, whether their hand luggage was not?

MR. PODESTA: I believe that all of the CAPPS selectees were subject to the required procedures under security direct 970 and its successors. Now, if they didn't have any checked baggage and a number of them didn't, the designation of selectees really has no consequences. If they did have checked baggage the checked baggage was handled in accordance with the regulations which varied, I think, a bit.

THE COURT: What you are telling me is there was no heightened scrutiny given of these nine in relationship to their persons or their hand luggage in relationship to what might be given to all others.

MR. PODESTA: I believe that is correct, your Honor, and I think --

THE COURT: And the plaintiffs would argue that it was

negligent to do that and the question is how do we articulate the standard that would be instructed the jury.

MR. PODESTA: The standard in terms of CAPPS selectees we would argue the standard is whether we met the requirement set forth in the federal regulations. CAPPS selectee program was created by federal regulations that was exclusively a federal creation and the question of whether we were negligent in applying CAPPS is a question of whether we substantially and reasonably complied with the federal CAPPS regulations.

THE COURT: So what would be the consequence of your motion? Suppose I granted your motion. What difference would it make in the trial?

MR. PODESTA: I think that we, I believe that the instruction if our motion were granted --The standard of care that the aviation defendants were expected to follow on 9/11 was established by federal regulations. Those regulations and I guess you would read the pertinent ones --

THE COURT: What would really be taken by the jury, the gut of it would be that there was not to be any greater scrutiny of a person who was identified by CAPPS except for his checked baggage.

MR. PODESTA: That is correct, beyond what an ordinary passenger would receive. You want me to instruct that as a matter of law. That would be the instruction. I think that could be the instruction as a matter of law. Then the question

of fact for the jury would be whether the aviation defendants substantially collide with the federal aviation and whether any breach of that regulation was a proximate cause of the plaintiff's injuries.

THE COURT: I'm going to take the liberty of a judge. Keep you in place and ask Mr. Joseph how you would want me to rule on this and what would be its consequence.

MR. JOSEPH: Your Honor, we would want to rule the way the FAA described a significance.

THE COURT: Louder.

MR. JOSEPH: In Exhibit 12 of our declaration we actually have the associate administrator for the FAA and civil aviation describe the importance of a security directive. This is Exhibit number 2.

THE COURT: Give me a moment.

MR. JOSEPH: Sure, your Honor.

If your Honor who look at the beginning of the third paragraph.

THE COURT: This is the letter of March 13, 1996.

MR. JOSEPH: Correct. By the associate administrator for civil aviation security. In the third paragraph he describes what the significance of a security directive is and it says security counter measures issued by the FAA in a security directive established security minimums for adoption by airlines and airports. Airlines and airports may exceed

these minimum standards by implementing more stringent security requirements. That would be the instruction we would say, your Honor, with respect to all of these standards because he has pointed to --

THE COURT: Let me help you out on this. What would be the way I would articulate a standard to the jury under your view given these two sentences.

MR. JOSEPH: Your Honor, I would use what Lockerbie says because Lockerbie was the law that presumably Congress had in mind when they were looking at what's inconsistent. These minimum standards what --

THE COURT: You would want me to tell the jury that what is stated in security directive 9701 was a minimum standard and whether or not some higher standard was to be used in relationship to these nine people was an exercise of what reason, judgment, stated standards.

MR. JOSEPH: And federal to use the highest degree of safety possible in the circumstances. But I also point out, look at the text that he is calling your attention to. It just allows in the first bullet point, it requires in the second bullet point. It doesn't purport to be exclusive or exclusive, but it doesn't say you can do no more.

THE COURT: Let me draw you out on here because I think we have a serious tension between two facets of a program. The concept of profiling is a very serious one. As

of the early morning of September 11, 2001 there was concern that profiling should not be exercised on ethnic lines among other aspects of forbidden categories and so if it was an ethnic base for suspicion the airlines could look at this court directive and say if we do more because these people appear ethnically suspicious, we're violating rights of citizens under American law and right of people and we should not do it and we should only do that which we're required to do. I think that would be your point, Mr. Podesta.

MR. PODESTA: Yes, it would.

THE COURT: And then we're told, hey, this is only minimum. You are supposed to do more. The airlines are at sea. What more should they do?

MR. JOSEPH: Your Honor, first of all, you understand that several of these individuals were CAPPS selectees. Secondly, a ticket agent --

THE COURT: What is CAPPS selectee.

MR. JOSEPH: Somebody who was identified under the CAPPS computer profile.

THE COURT: Mr. Podesta, it says nine out of ten.

MR. JOSEPH: So they weren't pulled out. Nothing procures them from doing further computer -- based on the circumstances and when you look at the cog and the ACSSP.

THE COURT: What the cog?

MR. JOSEPH: Check point operations guide which is

Exhibit 10 of our compilation.

THE COURT: Take me through that when I give you the chance and what was the other?

MR. JOSEPH: ACSSP air carrier standard security program. Both of them say --

THE COURT: You'll get back to me.

MR. JOSEPH: Yes, sir.

THE COURT: But now you've gotten a better heads up about what Mr. Joseph is going to say.

MR. PODESTA: First of all, with respect to Mr. Josephs example it has nothing to do with CAPPS. It's a letter about photo identification. In fact, if you look we submitted an FAA memo that was produced in FAA document discovery dated -- it says and it's dated February 14, 2000 and it says that by January one, 2000 --

THE COURT: What exhibit?

MR. PODESTA: Exhibit K. By January 1, 2000 all major airlines had voluntarily implemented CAPPS in advance of the rules mandating it as the only acceptable form of prescreening for scheduled operations.

THE COURT: Where is this?

MR. PODESTA: In the replay declaration.

THE COURT: No. Where in the exhibit? I want to read it with you.

MR. PODESTA: I am reading it from my brief actually.

MR. JOSEPH: TSA 0526, your Honor.

THE COURT: What paragraph?

MR. JOSEPH: The fourth bullet.

THE COURT: Got it.

MR. PODESTA: Now that language certainly doesn't seem to me the only acceptable form of passenger prescreening seems pretty mandatory and not minimum.

THE COURT: Now, do you accept or reject the proposition that an airline could do more if it wished to do more without violating the law?

MR. PODESTA: The answer to that is complicated. So give me a minute to answer it. There are certain limited areas where an airline could voluntarily do more tests coming into compliance with the FAA regulations before their due date giving additional screener training. You would say that has nothing to do with the issue of pre-emption. The minimum standard --

THE COURT: Let me put a hypothetical to you. I come in to an airport screener at LaGuardia. It's a busy day. I am above the CAPPS profile. I have no checked baggage. My bag goes through the flourescent device the magnetometer. I go through the magnetometer. I'm pulled aside even though nothing is registered for more scrutiny. If I refused I say I bought a ticket I am entitled to go on this airplane. You can't do anything more to me and the airline insists they will do more.

Is the airline subject to liability for preventing that person?

MR. PODESTA: You didn't alarm the magnetometer.

THE COURT: I did not.

MR. PODESTA: I believe that the airline if it pulled you aside after you didn't alarm the magnetometer and you did not exhibit any suspicious signs you were not belligerent, you were not --

THE COURT: I was very nice.

MR. PODESTA: You conducted yourself like Judge Hellerstein.

THE COURT: The best I could but I went to special acting school and I was able to get through.

MR. PODESTA: That would be inconsistent with the requirements of the federal regulation.

THE COURT: Therefore the airline could be liable for refusing a passenger on the plane.

MR. PODESTA: I can give you citations to that as well appendix three to the ACSSP which is Exhibit A to Mr. -- -- if you look at Exhibit A to the original declaration of Mr. Barry.

THE COURT: I have it.

MR. PODESTA: You will see and turn to Appendix three which is AALTSA 7592 and you'll see this is, this first page is the screening guidelines for persons and hand carry on items, the screening guidelines and you'll see in the introduction that this basically says this is what the FAA prescribes and it

says these guidelines are consistent with current legal guidelines, consistent with current legal guidelines not dissimilar from the language of the statue and are designed to effect uniform application optimum safety and the courteous and efficient treatment of all persons subject to preboard screening.

Then if you look down in Roman two on that page it says guideline or screening persons. And it says initial process something conducted by air carrier representative employee or agent screening company using either a walk through metal detector or a hand held metal detector and then it says if the person being screened does not alarm the detector the person is cleared to proceed beyond the screening point. There is no -- unless there is some special circumstance, but if you were just behaving in the courteous way you ordinarily do there would be no legal basis for the airline or the screener company to subject you to additional scrutiny and that's right in the regulations.

And the plaintiffs with the benefit of hindsight want to come in and say, well, we believe that New York law or Virginia law or Pennsylvania law required that even if you didn't alarm the magnetometer and were to the otherwise suspicious you could be subjected to additional hand held or pat-down searches. The regulations don't provide for that.

Now, in a special threat situation like if there was a

threat of a bomb for a particular flight the FAA could alter these regulations and say we are going to randomly inspect people but those weren't regulations we were operating on 9/11.

I think that that's a very clear example of where the plaintiffs appear to be suggesting something that we were not permitted to do. And they also seem to suggest that we should have conducted more physical searches of carry on bags instead of relying principally on x-rays.

But here again in this same exhibit if you turn to page 28 of the ACSSP and I'll give you the -- it sets forth the, it's TSA 7439 and it sets forth the requirements for screening carry on items and it's raised in -- all carry on items passing through the screening check point shall, mandatory language --

THE COURT: Where? I have it.

MR. PODESTA: Shall be screened using FAA approved inspection methods. And it basically goes, first it says when an image is displayed on an x-ray monitor and it looks -- then it must be subjected to additional screening. And it provides for two possibilities.

THE COURT: So there has to be a display. It has to be displayed how? Physically or through a --

MR. PODESTA: The primary. Let me take you through this. The primary method of inspection is x-ray. X-ray operator sees a possible threat item on the x-ray and he then

is supposed to direct the bag, the carry on bag to be sent for additional scrutiny. Now, what scrutiny it receives depends on what the threat item is perceived to be. If its perceived to be an explosive then you look at item A under two, which says exam the carry on item using an EDT device.

THE COURT: What is that?

MR. PODESTA: Explosive trace detector.

On the other hand if it's a gun or a knife you go to B and you conduct a physical inspection of the item which would be a hand search but that's only if the x-ray operator perceives a threat item when he looks through the screen.

Now, there is another requirement and that's continual inspections. And if you go down to item three it says, the following measure shall be conducted at all category X airports which included Logan and Newark and Dulles and it says inspections of carry on items shall be -- and where the first reference was A and unfortunately the TSA has deleted certain language but what the random search was if ETD devices were available they were supposed to be used to inspect carry on items that cannot be cleared by the x-ray operator then when a number of carry on items is not -- in other words the x-ray operator isn't saying any -- then there is supposed to be random inspection under item one. Other items must be random --

THE COURT: I don't think I understand. The number of

carry on items selected by the x-ray operator for image resolution not enough to insure continual ETD devices for inspection. I don't think I know what that means.

MR. PODESTA: Let me you try to explain it to you. The x-ray operator is looking through the bags and it happens to be that a whole bunch of nuns are boarding the plane and there is nothing at all suspicious, so the operator isn't selecting any items for the other screener to use the ETD device on or to do hand searches to look for a gun or a knife. In that event they just don't want them doing nothing. They want the screeners to randomly select for explosive trace detection inspection more carry on items so that randomly people coming through it see that on a random basis not every bag by any means but a certain percentage of bags are being subject to ETD and this shows, look --

THE COURT: The idea being deterrence of other people in the airport.

MR. PODESTA: Yes. It shows the preferred method was x-ray and ETD and you only got into hand searches where you didn't have ETD which was not the case at the 9/11 airports or where you had a trace item.

THE COURT: The point that you are teaching me, Mr. Podesta, is that these regulations were the sum and substance of what check point operators had to do and there is no room in your argument for additional high ended standards.

MR. PODESTA: Right. That is correct.

THE COURT: That if the airline was more diligent it exposed itself to liability.

MR. PODESTA: It was just, these are the legal requirements is my argument. Even if we could do more our failure to do more didn't expose us to legal liability.

THE COURT: I want to put this question. The -- law when standards are set out in regulation whether compliance is evidence of reasonable conduct or conclusive evidence of reasonable conduct. The first argument would say that the airlines could argue that I am not negligent because I did everything the lawyer told me to do, and other side will say but you could have done more and should have done more given whatever was going on at the time. You are saying that there is no room for that second argument and if there Mr. Joseph were to make that argument you would stand up and object and I should sustain your objection.

MR. PODESTA: I would hope you've taken care of it on a pretrial ruling but, yes, I would hope you would sustain my objection. The reason for that is that's what the statute is saying when it says inconsistent with or pre-empted by.

THE COURT: Mr. Joseph would say that it's certainly not pre-empted. There is no intent and is -- there is nothing inconsistent in this book of regulations with doing something extra if the circumstances made it reasonable for do something

extra. You are arguing that as a matter of law.

MR. PODESTA: I make two arguments on that. First, almost every standard of care is in some sense of minimum standard of care. You can always do more than the law legally requires.

If the tests were that you can do voluntarily something more than the reasonable care or the FAA regulations there would never be pre-emption indeed state law would just feed on itself. As reasonable care you exceed in reasonable care you set a new standard. There numerous case that define pre-emption that under the Federal Aviation Act, the 58 Act that Mary will get into and under the Price Anderson Amendments Act and many other statutes where the defendant could voluntarily have done something more. But he satisfied his legal obligation by meeting the federal regulations and the states were not entitled to require the defendant to do more than the federal regulations required on pain of liability.

THE COURT: Mr. Joseph would argue that if you can do more it then becomes a question of reasonableness. Should you do more?

MR. PODESTA: That's because Mr. Joseph reads the statutes it depends with the language where the crash occurred.

THE COURT: I am trying to bring out another point, Mr. Podesta. The consequence of your argument may be that it's wrong to do more, that it would be a violation of federal

regulations to do more, that if a passenger were to be stopped doing more that passenger could sue you for denying his entrance to a public transportation vehicle and I am wondering if I am drawing your argument too much.

MR. PODESTA: No. You are drawing the argument quite correctly. It is too facile to say --

THE COURT: You are not arguing the minimum. You are saying exclusive.

MR. PODESTA: Yes.

THE COURT: You can't do more. You shouldn't do more. You shouldn't do more.

MR. PODESTA: In most instances we shouldn't do anything more or different and it's --

THE COURT: When should you do more?

MR. PODESTA: Well, that gets me -- all right. There is an element of common sense required under the regulations. That is not a --

THE COURT: Mr. Joseph would rise up --

MR. PODESTA: He might rise.

THE COURT: I'll rise for him.

MR. PODESTA: The federal regulations set forth the exclusive standard to the extent they use words like "common sense" like in judging whether a particular knife is menacing. There might conceivably be a question of fact under the federal standards whether the particular screener or airline --

THE COURT: What do I care? The jury doesn't care, federal or state what the jury cares about and what I care about I am trying to think what I am supposed to do with the trial that is my test. So I am right to think if Mr. Joseph starts arguing reasonableness, you aren't reasonable, you aren't paying attention then I can't sustain our your objection whether it's federal source or state it makes no difference if it's federal -- of state makes no difference.

MR. PODESTA: Federal standard of common sense that has to be decided in the context of the federal regulations which say that four inch knives are generally permitted, Swiss army knives are generally permitted.

THE COURT: You use words like "generally".

MR. PODESTA: That is the federal standard. The cog says Swiss army knives are permitted, but the common --

THE COURT: What it generally means, what common sense exceptions mean is that the airlines could argue that I was absolutely reasonable, perfectly reasonable in doing what the federal law required me to do and not doing more and it would be permissible for Mr. Joseph to argue that in the circumstances presented on the morning of September 11, 2001, you should have done more and you would say what is the basis of that. And the basis of that is common sense. So you would say as matter of argument that I did what I had to do and you should have done more and the jury would decide.

MR. PODESTA: That is true, but that would be decided under the federal regulations.

THE COURT: What is the difference? The jury doesn't care about --

MR. PODESTA: Because if you just have a naked state law rule you don't have the basic starting point that knives under four inches are permitted unless they are menacing and the common sense comes into place in making a judgment as to whether a particular knife is menacing. The plaintiffs cont argue we should have banned all the --

THE COURT: I would think I agree with you. In other words, where there is a specific statement on an absolute -- in the regulation you should follow that. But where there is any kind of exception for common sense or where words like "generally" are used that suggest looking at circumstance that your conduct could be challenged on standards of reasonableness in the circumstance.

The jury doesn't hear whether it's a federal incorporation of the state standard to talk about common sense or not. What the jury is told is that the regulations say four inches and generally or common sense exception and then the question is is there grounds for an exception.

MR. PODESTA: There could be a question of fact. I think I agree with the way you phrase it as long as they're told this is what the federal regulation says we're obliged to

follow the federal regulations. You have to decide, ladies and gentlemen, whether in carrying out that regulation we exercise the --

THE COURT: I am going to want to talk with you more about this after I hear Mr. Joseph. I think what we're coming down to is something that I quite understand. It's going to be a difficult instruction to give because I have to incorporate all the specific regulations and deal with the common sense exceptions but it can be done and I think that's what I am learning from you, Mr. Podesta.

MR. PODESTA: You want me to sit down or may I continue?

THE COURT: Well, it's tempted to say yes.

MR. PODESTA: I can voluntarily do more.

THE COURT: I really enjoyed listening to you.

MR. PODESTA: Can I just make one more point then I will sit down complying with your Honor's regulation. To get back to your point about it's a very differ judgment to determine whether voluntarily exceeding is consistent with the regulations. For example, we could do more, could have done more than 9/11 by for example singling out all young Arab males or pat-down searches. That would have been more but it would have been inconsistent with the policy and the regulation.

Would it have been doing more to arm our pilots on 9/11 and just disregard the common strategy? Some might argue

was doing more, but it would be inconsistent the regulations. The regulations are based on a series of policy judgments that were designed, what is the threat, what is the best measure to meet the threat? How do I adopt these security measures while still maintaining an efficient air transportation system while still meeting our civil rights obligations to the passengers and that's why the FAA regulations control.

They're the ones who were making the judgment as to how to best take into account those various considerations. A jury 9/11 just given a post reasonable care standard is surely going to focus on security and ignore the other policy consideration the FAA had to take into account.

THE COURT: One of challenges of this trial would be to put the jury in a frame of mine before the events of 9/11 clearly and I fully anticipate the very interesting rhetoric that you've just expressed will be heard again in the mouth of an expert.

MR. PODESTA: Yes. But I would note that rhetoric would be a lot more speculative if we get some of discovery from the government that Mr. Wayland is going to be asking you for and I will try not to jump up, your Honor.

THE COURT: All right.

MR. ELLIS: Your Honor, I know you wanted limited argument from one attorney given until last evening that

Mr. Podesta would be the only presenter from our side. He focused on inconsistent with. I think adds your Honor started to say beginning of his presentation you were interested in pre-empted buy as well and if I would intrude on you too much if you gave me just a couple of minutes I could briefly address it.

THE COURT: Go ahead, Mr. Ellis.

MR. ELLIS: Thank you, your Honor.

THE COURT: Then I think we will break.

MR. ELLIS: Thank you, your Honor.

Just briefly, Jeffery Ellis on behalf of United.

The language of the statute not only has the words inconsistent with but also has the worlds pre-emptive buy. And as our supplemental briefing set forth there are three statutes that are at issue that, quite frankly, you need to look at in order to determine what is their pre-empted scheme and what the scope of any pre-empted that might be focused by that scheme.

Those statutes are the 1958 Federal Aviation Act, the cases we have cited to unequivocally establish that it was Congress's intent as long back as 1926 to establish a uniformity of regulation. It is that statute in 1958 that contained in its safety regulatory provisions, a minimum standards provision, as well as a savings of remedy provision for remedies existing at that time.

I might add, your Honor, that actually that provision

goes back to I believe it was 1926 and at that time including in 1958 any intervening criminal act would not allow any recovery for anyone.

So the remedies that were saved are saved in that statute. What is important I think most important in this litigation is the Aviation Security Improvement act which was passed in 1990 in response to Lockerbie. The Lockerbie decision did not have the Aviation Security Improvement Act to consider because it wasn't in effect.

The president established a commission to evaluate aviation security in the aftermath of Lockerbie and to come up with a solution to try and combat what was starting to be a growing problem international terrorism. The solution that Congress came up with in words of the statute are quite clear. They didn't want to have any screw-ups here. They wanted to try and set up a system to do the best they could and that system required in accordance with 29 U.S.C. 44904 it specifically required the director of the Federal Bureau of Investigation, the Administrator of the FAA to consult, to decide what are the most effective counter measures to address any deficiencies that they found to exist with respect to the security significance system.

Those words most effective correct any deficiency clearly mean what they say. The system that they mandated to be implemented was supposed to be the most effective and to

have corrected any deficiencies. The plaintiffs arguments is in essence, that system was not the most effective. It wasn't even reasonably effective and there were deficiencies. That flies in the face of the congressional language that Congress used in the Aviation Security Improvement Act and Section 44903 of that section specifically states that that system is supposed to be uniform for every air carrier --

THE COURT: I want to follow your argument. You are referencing sections 316 A of the public law --

MR. ELLIS: Your Honor, I wish I could tell you, but I think that was it, yes.

THE COURT: It reads as follows: The administrator of Federal Aviation Administration shall prescribe such reasonable rule and regulations; is that the one? Is that the section?

MR. ELLIS: I'm reading from the codification, your Honor, but go ahead.

THE COURT: Shall prescribe such reasonable -- I tell you what, let me ask you to look at the book.

(Pause)

MR. ELLIS: I think you are looking at the wrong section, your Honor.

THE COURT: I could follow you. I have it here. What is the section again?

MR. ELLIS: Your Honor, if you could look at 44904. Domestic air transportation security system. Your Honor, if

this is a good time for a break we can get the stuff and make it easier.

THE COURT: I don't want you to feel pressed. Let's take ten.

(Recess)

THE COURT: Okay.

MR. ELLIS: Thank you, your Honor.

I have a copy of the U.S.C., your Honor. And there were two sections I was going to refer you to. The first is 44904 and that section has three subparts. The statute itself is entitled Domestic Air Transportation security system. Section A is entitled Assessing Threats and it states: The administrator of the FAA and the director of the FBI jointly shall assess current and potential threats to the domestic air transportation security system. The assessment shall include consideration of the extent to which there are individuals with the capability and intent to carry out terrorist or related unlawful acts against that system and the ways in which those individuals might carry out those acts. The administrator and the director jointly shall decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system.

Section B again ascribes to the director and the administrator director of the FBI and the administrator of the FAA the challenge of assessing security that is in place in

response to those threats.

And Section C, improving security, states: The administrator shall take necessary actions to improve domestic air transportation security by correcting any deficiencies in that security discovered in the assessment analyses and monitoring carried out under this section.

And in conjunction with that, your Honor, Section 4944903 Subsection B (3) says: The administrator shall prescribe regulations to protect passengers and property on an aircraft operating in air transportation or intrastate air transportation against acts of criminal violence or aircraft piracy. When prescribing a regulation under this subsection the administrator shall and it goes on to state --

THE COURT: To the maximum extent practical to require a uniform procedure for searching and detaining passengers and property to ensure their safety and other criteria.

MR. ELLIS: It also says courteous and efficient treatment by an air carrier.

Your Honor, I can tell you that from the pre-emptive aspect of the issues that are before you --

THE COURT: What you are telling me, Mr. Ellis, implementing what Mr. Podesta was telling me is that there is a federal regulatory mechanism that needs to be observed. Whether there is any room for additive im put in terms of words like generally, minimum standard etc. that is the area where

reasonableness can be exercised. And to define what is reasonableness we look to what is established in the federal law and to whatever extent appropriate and to the common law.

MR. ELLIS: I would respectfully disagree to this extent, your Honor. You had asked a question of Mr. Podesta with respect to whether or not the failure to do more could hold airlines liable. I argue the third, before the Third Circuit the Abdulla case and argue before the Fifth Circuit the Witty case and that was the claim in both of those cases. In Abdulla it was claimed that American Airlines pilots instead of avoiding a thunder storm by 20 miles should have avoided by 40 or 100 miles.

THE COURT: Because of the dangerous nature of that thunder storm.

MR. ELLIS: More safety. An expert appeared and said that is what they should have done. The jury came back with a verdict and we moved to set the verdict aside. The district court judge agreed with us. He said that federal law pre-empted, you can't argue for more and the Third Circuit agreed.

In the Witty case which the Fifth Circuit took a couple of years ago after they had the Hodges case and they clarified what they meant in the Hodges case. But in the Witty case the argument was I got deep vein thrombosis on your flight. I got it because I was sitting in a cramped seat.

What you should have done is two things. You should have given me more of a warning telling me I could get deep vein thrombosis on an airline flight and you should have given me more leg room.

And what the Fifth Circuit said, number one, airline warnings are controlled by federal law. And airline warnings are prescribed by federal law not to require this additional information. You can't use that as a basis for liability.

The second thing that they said was the Airline Deregulation Act of 1978 precluded a claim requiring you to have more leg room because the net result of that would be increased fares and you can't use state law to try and achieve that result.

THE COURT: I think you'd like me to take note of several holdings in the Witty case. We hold that federal regulatory requirements for passenger safety warnings and instructions are exclusive and pre-empt all state standards and requirement.

MR. ELLIS: Yes, your Honor.

THE COURT: That's at page 385. Allowing courts and juries to decide under state law that warnings should be given in addition to those required by the Federal Aviation Administration would necessarily conflict with the federal regulations.

Here is another statement. We do not, for example,

express an opinion as to whether emergency or unplanned situations on flights can form the basis of a state failure to warn claim that is not pre-emptive.

MR. ELLIS: Yes, your Honor. Witty does -- I am sorry, your Honor.

THE COURT: I was just thinking to myself that there is room in these decisions for exercise of reasonable conduct. But the field is very largely occupied by its precise federal requirements.

MR. ELLIS: Your Honor, I would say this, and I'm going to cut my presentation off because you have been very kind to let me say a few words but I will say this, the Abdulla case, the Witty case which I know Ms. Gaston will get into, of course, will say that the entire field is occupied and they'll get into that aspect of it. But at the end of the day plaintiff's claim boils down to them saying that what the FAA was mandated to do by statute, namely, correct any deficiencies in the current system they didn't do and that we can be held liable for that. Not only do we say federal law pre-empts that argument, but I would also say this, your Honor, they do not dispute the fact --

THE COURT: I would like to hear that after I hear from Mr. Joseph.

MR. ELLIS: And I will just end with one thing, to the extent they claim that state law actually imposes higher

security requirements there is absolutely nothing --

THE COURT: Save that too.

MR. ELLIS: Okay. Thank you very much.

THE COURT: Ms. Gaston.

MS. GASTON: May it please the Court, your Honor, Mary Gaston, on behalf of the Boeing company.

As your Honor is aware, Boeing moved independently for a determination of the applicable law. Boeing did that, your Honor, for a very simple reason. All of the claims against Boeing.

THE COURT: Speak a little louder, please.

MS. GASTON: Yes, your Honor.

All of claims against Boeing are predicated on the factual allegation that the planes that were hijacked on 9/11 were defectively designed. Because the issue of whether Congress has pre-empted the area of aircraft design depends on an analysis of Federal Aviation Act of 1958 and its predecessor statute. That is the reason Boeing moved independently, your Honor. It required this Court to construct whether Congress intended to pre-empt the field of aircraft design from state regulation.

And I'd like to start there, your Honor, because of something that you just mentioned. You indicated that you felt that there was room in state law to both impose the federal regulations which you recognize are extensive as well as impose

state tort law.

THE COURT: No, I don't think so. If I said that I don't think that was an accurate reflection of what probably is the case. What I thought to say was that where there are issues of reasonableness probably they are federally sourced, but that since there is so little definition in federal law of standards and care, undoubtedly, the federal law would incorporate much of what the common law has developed.

I keep thinking, Ms. Gaston, how I am going to apply the information today. Presumably, it's in jury instructions. Presumably it will be in terms of objections. It may also be in the kinds of evidence that will be presented, for example, expert evidence. None of which is before me. So, largely, this can be informational. I don't know. But there is no motion to dismiss. There is no motion for summary judgment before me. But it's very important material that is been presented because it does inform how we all think about these cases.

MS. GASTON: That clarification, your Honor, is very helpful. It is very helpful in a couple of contexts, specifically, with regard to the Court's discussion of minimum standards. Turning to Section 408 B 2, your Honor, of the Stabilization Act which simply has the language in it that state law will be applied only if it is inconsistent or pre-empted.

Mr. Podesta covered at length the inconsistent provision. And I am going to occupy the field, your Honor, because I am going to devote almost all of my discussion to the issue of field pre-emption. But I would like to make one comment with regard to the inconsistent as it relates to Boeing.

You asked for examples of where there were any inconsistencies and we pointed out in our brief, your Honor, that as I mentioned earlier they are suing Boeing alleging that the door, the cockpit door was allegedly defective because it didn't prevent this hijacking.

On a totally collateral note, we've moved for summary judgment on the issue of causation that there is no linkage between the door and the hijacking. But, nonetheless, before the Court is the briefings on the standard of care which is why Boeing obviously submitted its Boeing motion.

With regard to that claim that the doors were defective and should have prevented a hijacking, we pointed out to the Court that this was an issue that the FAA specifically looked at back in the early 70s. The FAA explicitly published a notice of rule making, identifying that the issue of hijackers getting into the cockpit and harming the crew and taking over the plane was a matter of concerning to the FAA. And at FAA, therefore, put out a variety of rules suggesting ways that the cockpit could be made more intrusion resistant.

And over the course of several years it considered those options. And ultimately, your Honor, the FAA rejected any additional cockpit intrusion resistant measures for safety reasons.

We have provided that the federal registry sites in our brief, your Honor. The point of that is only that it would be inconsistent for obvious reason to hold Boeing liable under state tort law for an issue that the FAA, explicitly, as the determiner of aviation aircraft design safety determined was not appropriate.

THE COURT: I'd like you to take me through the applicable regulations.

MS. GASTON: I will, your Honor, if you could just give me one second.

(Pause)

MS. GASTON: The FAA notice of proposed rule making was first published in the federal register at volume 35 number 145 on Tuesday July 28, 1970 and it was docket number 1046D Notice of Proposed Rule Making 70-20. The name of the proposed rule was Pilot Compartment Security Large Passenger Carrier Airplanes. And in there, your Honor -- I don't know that I have the page in the federal register -- but on a second column in the proposed rule making it specifically identifies that despite concerted efforts being made by the FAA and air carriers incidents continue to occur within the safety of the

flight of aircraft engaged in passenger carrying operations under part 121 of the -- has before jeopardized by persons intending to harm the crew or take command of the aircraft.

In the context for this is, obviously, your Honor, the rash of hijackings that were occurring in the 1960s. The notice of proposed rule making goes on to discuss a variety of ways that they could increase the security of, for example, the cockpit door by improving the hinges, by improving the locking mechanism. It did discuss a way to permit the crew to view through the doors and a variety of other measures.

Approximately two years later there were additional security measures proposed by the FAA in conjunction with that same rule and it dealt with bulletproofing the cockpit, additional means that could be taken to protect the pilot in the event of a hijacking.

That occurred on Friday March 17, 1972 and was published in the Federal Register, volume 37, number 53.

Ultimately, your Honor, after receiving public comments, I believe they received approximately 20 different public comments, On Thursday September 27, 1973 Federal Registered, volume 38, number 187, the FAA published notice that it was withdrawing its proposed rule making notice 72-7 which was the subsequent number. You have to kind of walk it through to follow the numbering.

And the FAA explained why it was that it did so. It

explained that in light of the, what it referred to here as the comment strategy, the FAA approved way of dealing with hijackers. It referred to the fact that it was unlikely that simply strengthening the door would actually result in hijackers not entering the compartment because the pilot would let them in any way with a threat to a passenger or crew member. It did you say the fact that there was the fear that pilots negotiating behind a secured door might actually trigger more violence. The FAA actually discussed the fact that it also may increase the use of explosives to get into the cockpit. But the bottom line, your Honor, is these types of --

THE COURT: What you are saying is that there was a deliberate decision on the part of the agency regulating air craft manufacturer not to have intrusion proof doors.

MS. GASTON: That is correct, your Honor. And the FAA has made clear --

THE COURT: That's preclusive. What you are saying is that since the FAA made a conscious deliberate decision after proposed rule making not to do it. Then the states don't have the power, common law or statute to mandate doing it.

MS. GASTON: I agree, your Honor.

THE COURT: That's your argument.

MS. GASTON: I agree, your Honor, for two different reasons. First because of conflict pre-emption because it would be inconsistent for the states to require something which

the FAA has decided not to do. So under classic conflict pre-emption and in fact under the -- decision of 2000 that conclusion is mandated. You cannot force, the states can't force the manufacturers --

THE COURT: That is what I was trying to say.

MS. GASTON: But the second issue is equally important and that is you cannot do it because the issue -- because Congress has decided that the field is occupied and that is important, your Honor, and that is what I'd like to focus my attention on. I'd actually like to discuss --

THE COURT: I don't think you need to say much about that. This is aircraft design state to state. It's not a matter of having state interest. State can supersede the federal interests. It is clearly an argument for commonality here.

MS. GASTON: I would agree.

THE COURT: I think you can reserve on that point. If it's raised you can come back but I think that point is clear.

MS. GASTON: Okay. In that case, your Honor, the reason I had and intended to focus the discussion on field pre-emption is because it seems from the judge's comments that where there were minimum standards, and there is no question that that language is in the Federal Aviation Act --

THE COURT: You are saying that the Federal Aviation Administration deliberately decided that it did not want

intrusion proof doors being manufactured on airplanes.

MS. GASTON: Right.

THE COURT: Because in its judgment it thought it was counterproductive. That is a very important decision. Now, I guess the way it decided it may be important and why they decided it may be important. But you are telling me that this was a deliberate, conscious decision weighing the pros and cons of the situation and exercising judgment by the federal agency and how it exercises such judgment.

MS. GASTON: That is correct, your Honor. But given the creativity --

THE COURT: Why didn't you move for summary judgment.

MS. GASTON: My expectation that we will after you rule on our causation position.

THE COURT: Well, I ruled against you on causation. No, on duty. But the causation argument is a different argument.

MS. GASTON: That is correct, your Honor.

THE COURT: You are saying that the argument of negligence is faulty because you did what the feds told you to do.

MS. GASTON: That's correct, your Honor.

THE COURT: Well, it's a different argument from that which was made before. The argument I ruled against you was on duty. The issue of proximate cause is, I think, factor and

very much depends on the issue of intervening cause. But that's not why we're here today. We are talking about standard negligence and you are saying that you complied with standards.

MS. GASTON: Your Honor, yes, I am saying that we complied with the standard including the standard with regard to the cockpit door and we did exactly what the FAA told us to do. There are also, however, this plaintiff's complaint, some more amorphous allegations of numbers against Boeing where they allege that the plane is defective but they don't allege with any specificity how the plane is defective.

The concept of field pre-emption, therefore, is still applicable.

THE COURT: Well, at this point in time I think we're going to need some more definition. I want to read out the portion of my decision on duty reported at 28 F.Supp 2d 279 having to do with Boeing. It appears at pages 307 and 308 of the decision.

Boeing also argues that the regulations of FAA relating to the design of passenger airplanes did not require an impenetrable cockpit door and thus it designs which satisfied FAA requirements could not be defective. However, the only support provided by Boeing of its argument is after the fact FAA policy statement issued to explain why the FAA in 2002 was requiring airplane manufacturers to provide such doors even though the FAA previously had not done so.

And what you are doing now is going back to 1973 and showing me that this had been a conscious decision much earlier and controlled what was done in relationship to aircraft that were flown on September 11, 2001.

MS. GASTON: That is correct.

THE COURT: Why don't we reserve everything else until after we here from Joseph?

MS. GASTON: Will do.

Thank you very much, your Honor.

MR. WOOD: My name is Mark Wood and I am counsel for Massachusetts Port Authority, although, this morning I am also speaking on behalf of Dulles International Airport and Newark International Airport.

Your Honor, I will try to be brief and not to repeat what has been gone over by my colleagues.

THE COURT: I won't let you.

MR. WOOD: I am sure of that. I have previous experience.

After the airport operators, of course, there is about airport security, this case. And we seek a ruling that federal law assigns the airport security responsibilities. In other words, you have to look at federal law to find out at an airport, JFK or Logan or any other of these airports in the country, you have to look at federal law to find out what the security responsibilities are and one of the reasons --

THE COURT: Doesn't Mr. Ellis's argument on pre-emption and Mr. Podesta's argument on an inconsistent with and the specific statutes given to me by Mr. Ellis really say what you want to say?

MR. WOOD: Well, it does, your Honor. If you would also note that at pages ten to 14 of our opening brief we have other specific statutes and regulations that are apply specifically, your Honor, to airports.

THE COURT: Let's go to those. Go right to the extra stuff.

MR. WOOD: Okay.

THE COURT: I have your brief in front of me.

MR. WOOD: We start out with -- if you look at page 11 at 49 U.S.C. 449003B and in those sections Aviation Act specifically delineates security responsibilities.

I think if you look at the brief rather than have me treck through all of this, your Honor --

THE COURT: You know, Mr. Wood, I learned in law school that you go to the source. Stay you away from secondary stuff.

MR. WOOD: And if you go to the source you find out that the administrator of the FAA is directed to prescribe regulations requiring preboarding screening and that's the obligation of the air carrier.

THE COURT: Administrator shall prescribe regulations

to protect passengers and property on an aircraft operating in air transportation or intrastate air transportation against an act of criminal violation or aircraft piracy 44903B. That's what Mr. Ellis read.

I really want to move you into new stuff. Let's assume that one of the requirements that Congress required of you -- decide to consented to the President's Act is I knew how to read and remember. So let's go from there.

MR. WOOD: The same act then talks about what the airports are to do which Mr. Ellis didn't talk about and that is the administrator will prescribe rules and regulations. I am looking at 44903C2A to address access control by carrier at an airport operates and to take measures to improved system of access control.

And the way, your Honor, if you look further in our brief that that is done is under 14 CFR Section 107. And under 107 there is a whole many pages of specifics federal regulations on how that is to be done. You have to give badges to people who use the doors. You have to keep the doors looked. You have to put a fence up around your airport and a number of other things.

This is very carefully, specifically set out as to how security at an airport is to be handled and it is divided up among three parties. It is divided up among the airport operator, the airlines that are using the airport and the FAA.

And the FAA, your Honor, in 49 U.S.C. Section 44933B3 are directed to supervise and to approve the way these responsibilities are being carried and that has to be done with a written plan, your Honor, an ASP that we talk about for the airports and by a written plan for the airlines. And once those are approved you can't deviate from those plans at Logan or Dulles or Newark without having the FAA approve the deviation that you would like to implement at your airport.

THE COURT: Each airport has a federal security manager appointed by the FAA?

MR. WOOD: Yes, your Honor.

THE COURT: And that manager is to receive intelligence information related to aviation security.

MR. WOOD: One of his duties.

THE COURT: And insure and assist in the development of a comprehensive security plan for the airport, establishing each carrier's responsibility.

MR. WOOD: Yes, your Honor.

THE COURT: And measures to be taken during periods of normal aircraft operations and during periods where the manager decides that there is a need for additional airport security.

What else is there to look at?

MR. WOOD: I think the other point is that if you are going to deviate from what that regional administrator has approved that you can do at Newark Airport you have to get

specific authorization and approval from him in order, or her, in order to do that.

THE COURT: Where does it say that?

MR. WOOD: It's found, your Honor, in Part 107.3A. The citation would be 14 CFR 107.3A. It's a requirement that the airports adopt and carry out a security program that must be approved by the director of civil aviation security by the FAA. And for example, your Honor, and this applies to the airlines with the manual or with the approved plan that we were talking, Mr. Ellis was talking about. American airlines out at --

THE COURT: Let me ask this question. This fellow is a federal appointee, the security manager? He is a federal appointee?

MR. WOOD: Yes, he is.

THE COURT: If he is a federal appointee and he makes a mistake the airport authority doesn't get blamed, does it?

MR. WOOD: Well, if the airport authority follows the approved plan it doesn't get blamed, that's correct.

THE COURT: So the question then becomes, is there anything in the regulations that apply to the airport authority which gives judgment in and discretion to the airport authority.

MR. WOOD: Not with respect to the delineation of these responsibilities.

THE COURT: Well, you are saying then --

MR. WOOD: If Dulles couldn't decide, we're going to start screening passenger. They're not authorized or approved in the ASP to do that. And without getting the FAA's approval to do that they couldn't do that. It would be illegal to do that. And of course the reason for this, your Honor, is that if it's everybody's responsibility for security at an airport then nobody's accountable and --

THE COURT: So who is responsible at Dulles?

MR. WOOD: At Dulles it is very specifically set out that the responsibility, for example, for screening passenger and cargo carriers are the air carriers. It's set out by Congressional statute --

THE COURT: So your argument is that there is no room for liability on the part of airport authority?

MR. WOOD: Not as to that defining responsibility.

THE COURT: What is the argument of liability on the part of the airport authority?

MR. WOOD: What is the plaintiff's argument against the airport authorities? Well, in the master complaint, your Honor, it is so vague and amorphous. That was one of the reasons we came in with a motion to dismiss. We don't know. We're responsible for a safe airport.

THE COURT: You don't know why you are being sued?

MR. WOOD: That's basically what the contention is we

are responsible for a safe airport.

THE COURT: You are saying that as long as I've delegated to the right people, that is all I have to do.

MR. WOOD: No. What I am saying is that as long as we have complied, not negligently complied with the responsibilities that are assigned to us under this federal scheme then we're not liable.

THE COURT: Do you know what, if any, aspect of responsibility is complained of as actionable against you?

MR. WOOD: Not other than operating a safe airport there has been no allegation -- Someone came through a fence or a door.

THE COURT: Why don't you reserve until after Mr. Joseph speaks.

MR. WOOD: If I could just make one other part --

THE COURT: I think you should reserve. Since you don't know, then there is no point in arguing.

Mr. Joseph, you are going to divide it up in, I guess, the same sequence as we heard this morning.

MR. JOSEPH: Speaking for the plaintiffs, my argument going to be direct primarily to the airlines in the security companies. We did not sue the airport operators. Mr. Williamson can address that. I may cover Boeing a bit because the statute -- I'm going to go through a statutory analysis was your Honor as I believe your Honor has indicated a

penchant to do and I will touch on the Boeing issue as well. But I am not first in that. Mr. Williamson will do that.

THE COURT: Mr. Williamson, you will do Boeing and airport authority.

MR. WILLIAMSON: Yes, your Honor.

MR. JOSEPH: Your Honor, let me begin with inconsistent with. I am not going to go definitionally first. We actually have some learning from Second Circuit as contours as inconsistent with. We have some legislative history, but I'll come back to that. Let's just take it in a colloquial way from now.

If Congress said they didn't want actions to be premised on notions that were inconsistent with federal law what is it that Congress would have in mind? What was it that the industry, that the FAA said these regulations meant? Were they a pass, a free pass if they were honored to go forward or were they minimum standards because of the statutory duty to exercise the highest possible degree of safety in the public interest?

And your Honor if you have our declaration handy that might be useful.

THE COURT: Yes.

MR. JOSEPH: Exhibit 19 of that declaration is from the FAA web site as it existed on 9/11. At the top of page you'll see it's dealing with civil aviation security. So this

is what the FAA thought on 9/11 with respect to civil aviation security. If you look at the third question on the first page, can an airline exceed FAA minimum requirements? Answer: Yes, the FAA sets minimum requirements for airlines to follow. Should airlines wish to exceed those requirements, the FAA cannot prohibit them from doing so.

And if your Honor will with me turn to page four of five, again, this is the printout from the FAA web site.

THE COURT: This responds directly to Mr. Ellis's argument.

MR. JOSEPH: Exactly, your Honor.

THE COURT: Of Abdulla and Witty teach that the regulations are conclusive.

MR. JOSEPH: Your Honor, the Abdulla case deals with a specific regulation that specifically sets out a standard of care. We have a small statutory compilation for your Honor that might be handy, if I could hand it to you and opposing counsel that I will be referring to.

THE COURT: Yes.

MR. JOSEPH: Your Honor, Abdulla standard is number nine in here, the last one. It's 14 CFR 91.13, careless or reckless operation. And it says, A, aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. Here the FAA has spoken and set

forth a standard of care and that is a standard of care that does not apply to security.

We have a statutory standard of care which is in the first tab 44701, Subdivision D. And this is in prescribing regulations which includes security regulation. It says when prescribing regulation or standard under Subsection A or B --

THE COURT: Slow down.

MR. JOSEPH: Subsection D is the last subsection on the last threes line up from the bottom. When prescribing a regular or standard under subsection A or B of this section or any of other sections of this title, the administrator shall, one, consider, A, the duty of an air carrier to provide service with the highest possible degree of safety in the public interest.

Now, this statute has a predecessor which the Second Circuit has spoken on and said that this is the standard in the security case. The predecessor statute is Section 601 of the 1958 Act which we have as Tab 7.

THE COURT: That one that says minimum standards.

MR. JOSEPH: The minimum standards is here also at the top of the same page. This is as it is on 9/11 Subdivision A at the top. The administrator of the Federal Aviation administration shall promote safe flight of civil aircraft in air commerce by prescribing -- and if you skip down to subdivision five -- regulations a minimum standards for other

practices, methods and procedures the administrator finds necessary for safety in air commerce and international security.

And when we get to it I'll show that the security regulations cite this statute and the next one which says the same thing as authority for the regulations. So minimum standards are premised with the regulations, the highest degree of safety is the premise, and this existed back throughout the time we're dealing with through since 1958. I believe it's subdivision tab 6. I believe it's tab four, your Honor.

This is the 1958 version which says exactly the same thing in another order. In Section 601A at the top it says the administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft and air commerce by prescribing and revising from time to time such minimum standards governing the designs, materials, workmanship construction and performance -- and if you skip all the way down to six -- such reasonable rules and regulations or minimal standards governing other practices, methods and procedure as the administrator may find necessary to provide adequately for national security safety and commerce. And subdivision B states again in prescribing standards, rules and regulations. And in issuing certificates under this title. The administrator shall give full consideration resting upon air carriers to perform their services with the highest possible

degree of safety in the public interest.

In 1975 the Second Circuit had a hijacking case refusal of -- it was called Williams against TWA. And Williams TWA 509 F.2d at 946, the Court says that under this statute and under the common law in dealing with these court obligations the airline has the duty to exercise highest possible degree of safety. And in effect it would be remarkable if any court ruled otherwise that when millions of lives are at stake the defendants have a duty other than to exercise the highest possible degree of safety in the public interest.

So we have then minimum standards in the statute. We have as I started to show you from the FAA web site, the FAA says, these are minimums. If your Honor would turn on Exhibit 19 to page 4 it is actually even more specific on screening issues since that's come up today.

It's page 405 at the top. It's 513 at the bottom. The first question at the top:

"Q. Why can I carry the same item through bun passenger screening check point and not through others?

"A. Some airlines or airports have stricter interpretations of deadly and dangerous items. What one airline will allow, other airlines will not.

Next question.

Q. What items are prohibited beyond the passenger screening check point?

A. The FAA prohibits airlines from allowing dangerous or deadly items through the passenger screening check point. Because of the subjective description of dangerous or deadly items it is the airlines' responsibility to determine what they will allow. Most airlines will prohibit items such as scissors, tray tools and items resembling firearms.

There was no question that if we just tak inconsistent with as a colloquial use of language, what the FAA thought, what Congress is presumed to have thought they were dealing with minimum standards that there was discretion.

THE COURT: What is the legal strength of this document?

MR. JOSEPH: Your Honor, it is some deference if you find it persuasive. I'm going to go through the statutory basis for why it should be given. It's some deference because it's not an official one. I intend to go through statute, regulation --

THE COURT: Mr. Joseph, don't rush it.

MR. JOSEPH: Thank you, your Honor.

We went through Exhibit 12 before which is the associated administrator of the FAA for civil aviation security saying that security directives established security minimums. That gentleman's predecessor, that was '96, issued a similar statement a letter in 2001, two months before 9/11 and that's Exhibit 14 of the binder you have before you.

THE COURT: I have it.

MR. JOSEPH: All right. Your Honor, the second paragraph beginning in the fourth line at the end of the line the sentence begins: The Federal Aviation Administration, FAA, provides guidelines for air carriers to determine what may constitute a deadly or dangerous weapon. While airlines are required to meet certain standards, they possess the final decision to impose more stringent restrictions for carry on items.

THE COURT: This letter by Michael A. Caravan, associate administrator for civil aviation security has what effect?

MR. JOSEPH: Again, your Honor, an expression of an agency's view that is not codified is due some deference if your Honor finds it persuasive. But since we're dealing with what Congress had in mind when its issuing a statute that says inconsistent with, we suggest that it is worth deference --

THE COURT: I certainly have to look at it.

MR. JOSEPH: It will depend on whether you find it persuasive. We saw what 44701 and afterwards 44702 says the same thing. The highest degree of public safety and minimum standards. And this is completely consistent with a minimum standard analysis. It is more than just the FAA though because the airlines themselves were aware of this. But before I leave the FAA there was discussion by counsel earlier -- I believe it

was by Mr. Podesta -- of an ACSSP and various provisions of the ACSSP. And the argument was if we follow the ACSSP we're blessed. That isn't what they were told by the FAA and it isn't what they told their own ground coordinators.

And if your Honor would look with me at Exhibit 25 in the binder before you, this is a PowerPoint presentation by an FAA employee, Annmarie Avala who was the principal security inspector for U.S. Airways an employee of the FAA. Your Honor, the last -- the second to the last page of this exhibit -- 233 is the Bates number at the bottom -- is entitled program oversight and it's a talking about prescreening, the first dashed item dealing with this is U.S. Air carriers must follow the air carrier standard security program, ACSSP requirements. And then if you look at the last line of text on the page, and her comments it is says U.S. Airways may go above and beyond the requirements. Everybody understood on the FAA side and on the airlines side these are minimum requirements.

And the next exhibit in the binders, Exhibit 26, which is a set of PowerPoints three weeks before 9/11 that were put together by U.S. Air to instruct the ground security coordinators, the initial training August 21, 22 and 23 of 2001.

And if you will turn with me, your Honor, to the Bates numbered page. It's about third from the end.

THE COURT: Okay. This is --

MR. JOSEPH: This is a U.S. Air document. This was not to show what the industry actually understood.

THE COURT: Who is presenting?

MR. JOSEPH: All we know is that they've produced it as a PowerPoint. It's being given as training to their ground security coordinators.

THE COURT: U.S. Air?

MR. JOSEPH: U.S. Air. The first textural paragraph on page 2426 beneath the PowerPoint. The PowerPoint says base line security measures. The explanatory text beneath it reads: The ACSSP manual establishes base line security measures. These measures are the minimum requirements necessary for each carrier. Each carrier may implement more restrictive measures when deemed necessary.

Contrary to what your Honor is being told now the airlines did not on 9/11 believe that they could and should do only what was required, what the base line was. That is evidence. Or we would not dispute that that is evidence of their compliance with the standard of care. It is not dispositive. The circumstances determine that. And we are going to go into a few moments to the check point operations guide and even the ACS that's more discretion because all of these are context driven.

But I just want to step back for a second.

THE COURT: Supposing I agree with you.

MR. JOSEPH: Yes, your Honor.

THE COURT: What is the practical consequence of today's exercise?

MR. JOSEPH: Let me read Lockerbie instruction because this is what we would like, something like that standards of care Lockerbie was a Warsaw Act case. This was the instruction: Mere compliance of government regulations --

THE COURT: Slowly, please.

MR. JOSEPH: Mere compliance with government regulations is not necessarily proof of absence of willful misconduct, a much higher standard because it was a Warsaw convention case. Compliance where government regulations is not necessarily proof of absence of willful misconduct. You may, for example, find that the circumstances existing for the security of Flight 103 on December 1, 1988, required the defendants to provide security measures in addition to the minimum standards required by the FAA regulations and the ACSSP. And that's really where we are, your Honor, that what Lockerbie said, what the FAA said.

THE COURT: So what you want is ruling that one instruction over another will be appropriate.

MR. JOSEPH: Correct. That that is something that is evidence --

THE COURT: Like a motion in limine.

MR. JOSEPH: Like our precharge conference, your Honor.

THE COURT: Way too early though.

MR. JOSEPH: We didn't file the first brief but we are not going to sit quietly by when it is filed.

THE COURT: I think this is very, very useful and important.

MR. JOSEPH: Your Honor, what I don't want to do is --

THE COURT: The later -- Younger taught trial advocacy better than anybody else and one of the things I took from him is that when you prepare a trial you prepare for what you'll say last and what the judge will instruct last. So in effect you are conditioning me, both sides, of what I have to say to the jury and that conditioning will influence everything you do during the trial. So therefore it is important.

MR. JOSEPH: Your Honor, what I don't want to do is wear the patience of Court.

THE COURT: I'll let you know.

MR. JOSEPH: I would like to turn to a few provisions in check point operations guide.

THE COURT: The reason I want you to do this slowly, Mr. Joseph, is because I have to deal with text and I need to absorb the text and you are giving me a run through of the applicable text. So I need to be absorb what you say and I think everyone else needs to absorb. You are doing what is

essential. Take your time to do it.

MR. JOSEPH: Thank you, your Honor.

If we could turn to Exhibit 10 in the compilation which is the check point operations guide. And there is lot in the briefs about this document which is something that is -- let's be candid. There is no question there are uniformed procedures. The only question is whether that's the be all and end all or whether, in fact, they have discretion and a duty to exercise that

THE COURT: I think Mr. Podesta agreed that this is an exercise in discretion and that charge I have to give and it's not the Lockerbie charge, but the charge I have to give has to take into consideration what the check point people are instructed to do and what element of discretion they have and what standards you should govern that element of discretion. And I have a feeling that at the end of today there is going to be a large area of agreement.

MR. JOSEPH: I think looking a check point you'll see that they have complete discretion whenever there was any threat potential threat to safety.

THE COURT: That begs the question of what I was asking Mr. Podesta about how do we deal with this computer generated heightened threat analysis. You know, I don't want to disturb your --

MR. JOSEPH: Your Honor, in 2007 if there is anybody

who suggest that there is not anti-air -- in the United States would be a lie, but in 2001 we hadn't had 9/11. Nobody knew who Osama Bin Laden was. We're concerned now about focusing on what was going on in 9/11. Ticketing agents -- and we have testimony about this -- had the discretion to put somebody into the CAPPS system. It wasn't just the computer profile. There is nothing preclusive. Safety is the paramount goal. And we have testimony from a person named Ernie Miller to that effect.

THE COURT: I would believe that. But the question is what are the criteria that allows someone to do that? And we're a little frustrated because of what Ms. Goldman said before about we don't know what the criteria are and we're concerned that profiling by ethnicity may not have been appropriate.

MR. JOSEPH: Your Honor, these people were computer generated selectees. These people looked suspicious. It wasn't ethnicity. But if that's an argument they want to make that it was because they were concerned about issues whether you call it political correctness or legitimate concern about people's rights, they can make the argument. But it's a factual determination. We don't determine if -- this isn't even a 56 motion on motion a determining the applicable standard of care. The applicable standard of care is set forth in Williams and Lockerbie. It's a high standard of care and it's reasonableness the circumstances given that duty.

THE COURT: Federal standard you are saying.

MR. JOSEPH: Williams says the common law in the states is the same. The reason we focused on the state standards access says you apply state law unless it's inconsistent and there's no inconsistency. I think we're saying the same thing though.

THE COURT: You know the trouble with dealing with large abstractions is they appear to be a guidelines but they cause more trouble because your experience, my experience, Mr. Podesta and Ms. Gaston, everything depends on the particular matter before the Court, particular document that's given before the Court, the particular expression of a witness. It's very hard to deal in limine with these kinds of issues.

MR. JOSEPH: You are right, your Honor. We were on Exhibit 10 which is the check point operations guide. If your Honor will turn to the second page of the document, page 11991. It's the preface, this applies to the entire check point operations guide. And if you look at the fourth paragraph it says the cog as is inclusive as possible. However, some situations do not lend themselves to specific procedures. Screeners, supervisors and managers must keep in mind that some day-to-day situations will require -- will occur that require on-site decisions. Discretion is built into the system.

If your Honor will turn with me to the next page.

THE COURT: You didn't want to read the next sentence?

MR. JOSEPH: No action should ever be taken that could compromise the aviation security process. All probables should be resolved by the most experienced screener or supervisor available and/or referred to responsible airline. The responsible airline.

Discretion is built into the system because we're dealing with minimum standard. The next page is dealing with weapons and explosive devices. It makes exactly the same point. I am looking at the last paragraph. And if you start on the third line it begins with the sentence that says: Knives with blades under 4 inches, such as Swiss army knives, scout knives, pocket utility fives, etc. may be allowed to enter -- may. However, some knives with blades under 4 inches could be considered by a reasonable person to be a "menacing knife" and/or maybe illegal under local law. No. Local law is stricter you have to apply local law. And should not be allowed to enter into the sterile area and we have serrated knives.

THE COURT: Stay with this. Explore this with me.

MR. JOSEPH: This means that when these gentlemen walked through there was discretion. It wasn't enough just to say the blades were 3.9 inches.

THE COURT: What did they have? They had box cutters.

MR. JOSEPH: Your Honor, if we are going to get into the facts, it's not a 56 motion. I'm not the right person to

be giving you all the facts.

THE COURT: The reason I am asking is because I am reluctant to express a view. I think although educational and important it is also premature. I am reluctant to express a point of view except with respect to something very specific put before me.

MR. JOSEPH: It may be, your Honor, that this is something that needs to be done in a 56 context after discovery. We've only had --

THE COURT: If I let you all go you'll have 6500 more.

MR. JOSEPH: Any time, your Honor, you want to set a trial date that's okay. Let me just, my point here is simply we're dealing with generalities with the standard of care discretion is built into this federal system.

THE COURT: What would you think of a trial date on damages? Discovery that's still to go with liability. The damages issue are discrete.

MR. JOSEPH: My inclination, Judge, is to say any trial we can get is a good trial.

THE COURT: I think so too.

MR. JOSEPH: I may have 35 cocounsel to disagree with me. Your Honor, again, I am going to go through two more pages of this.

THE COURT: Go ahead.

MR. JOSEPH: When we are talking about whether or not

actions are prescribed and as an automaton does it.

THE COURT: Just stop it. I am thinking, you know, what am I supposed to take from this? If the knives are under four inches Mr. Podesta's clients would say that they didn't have to stop. They also tell me about the rules that say look only at the checked baggage.

MR. JOSEPH: Nothing stops anybody from doing --

THE COURT: And then the question comes what are the reasons that arguably require them to do more? And how do I formulate that standard to my mind? The jury doesn't care if it's a federal mandate or a state mandated standard. They need to know what the right rule is to be applied.

MR. JOSEPH: Your Honor, I think this the only issue that can be resolved today is that we're dealing with are minimum standards and there is discretion involved and there is a factual determination whether or not the behavior was reasonable given -- I don't think that there is anything else that can come out of today's hearing. It is not a summary judgment hearing. But the argument that's being made by the defendants is that near compliance exonerates them. Now Mr. Podesta seemed to back off at that and I respect that but --

THE COURT: Well, he didn't back off that. That was his argument throughout. He had to lead me through it the way you are leading me through it. The question I keep coming back

to is, what do I take from this? What do I learn from this? I know that we all have to respect what is stated in the federal law and we do. The question is where are the outside perimeters of when we start to argue.

MR. JOSEPH: There are two points that are basically summarized in -- Your Honor, what I was saying is that I think the clear dichotomy -- to go back to your question -- the clear dichotomy is are the standards preclusive if honored. We won't say they weren't honored. But they preclusive if honored minimum standards -- we think that the law is very clear that the latter is correct. But I don't think more than that could is correct. Your Honor wouldn't be ruling that they have --

The second take away, I believe, would come from the Williams case from 44701-44702 and from the regs that are security regs enacted pursuant to those statutes and others and that it is a duty to exercise the highest possible degree of safety in the public interest in connection with operations including security operations.

Now, that doesn't decide anything other than what is the framework that we're working with, but I believe those are the take aways from today. Those are the two issues because the contract position simply we do what we're told and that was sufficient.

Your Honor, there is one more, perhaps, two more in the cog that I could point out, but I think your Honor has the

flavor for this and our brief does recite the specifics here and since we're going to break in about 5 minutes I think -- let's turn to Exhibit 11 which is --

THE COURT: I'm very interested in Ms. Gaston's point.

MR. JOSEPH: That's not my area, but I can point one thing out because she alluded to it, but your Honor didn't -- your Honor just said why don't you reserve on it. If you go back to tab one in the statutory compilation, the manageable one that ended up. Tab one. I read Section A and then I read A5. A being the administrator of the FAA shall promote safe light --

THE COURT: I took note of that. That's minimum standard also in aircraft design but what she pointed out to me is something more that a deliberate choice was made by FAA don't have cockpit intrusion proof doors.

MR. JOSEPH: I'm not the right person, all I can say is, your Honor --

THE COURT: Then pass on it.

MR. JOSEPH: -- counsel will address that. Let me just pass for that.

The ACSSP is the other document to which they would give preclusive effect. That's the air carrier standard security program. We have that as Exhibit 11 in the large document. And, perhaps, the quickest way just to give an example if you go to the page at the bottom that is XC and then

at the end 966.

THE COURT: Last page I have is 909.

MR. JOSEPH: I'm sorry. It's further up than that. It's in the middle somewhere.

THE COURT: Oh, I see. I have it.

MR. JOSEPH: At the top of the page is deadly or dangerous weapon guidelines and you will just read the first paragraph. The following guidelines are furnished to assist in making a reasonable determination of what property in the possession of a person should be considered a deadly or dangerous weapon. They are only guidelines however and common sense should always prevail. So everything here whether it's in a reasonableness standard --

THE COURT: How do I find common sense? How do I instruct the jury as to common sense?

MR. JOSEPH: They have to act reasonably recognizing what their duty is to act --

THE COURT: How does it differ from what came out at the end of Mr. Podesta's argument or Mr. Ellis's argument?

MR. JOSEPH: Compliance is not preclusive. Mr. Ellis was talking about -- but in terms of actually what the standard is, I believe we may all be in agreement that the standard is that we have regulations that evidence of compliance of regulations is evidence a jury may consider on the issue of reasonableness, but it's not dispositive.

THE COURT: Whether you do more depends on the circumstances.

MR. JOSEPH: Exactly right. Perhaps I should turn for a second to the pre-emption issue. It's been fully briefed.

THE COURT: I think your point here is that where there are specific ways of flying outside of the thunder storm or whom to admit or whom not to admit in some specific instance, I follow it. You don't do less and you don't do more. But where regulations are intended to be setting minimum standards, the suggestion in the regulations themselves that there may be times when you do more.

MR. JOSEPH: Your Honor, let me address Abdulla for a second. Abdulla was tried under the state common law standard of reasonableness. The Third Circuit I pointed your Honor to the reg and the Court said, of course, the district court may just reinstate the same verdict because the standard may be no different. The regs that they are relying on don't purport to be preclusive of anything else and that is why we point to what the FAA is saying what the cog says.

THE COURT: I keep asking what are the take away points and I'm not sure that there is differences among you.

MR. JOSEPH: We would agree with the articulation of what your Honor just made of what that duty is and what that standard is. May I make a couple points? I am perfectly prepared to be told no.

THE COURT: Cardoza expressed himself as a state judge and later as a federal judge, justice, the same person who spoke and if he made sense in one category he made sense in a different category. Defined the common law standards of reasonableness. It's the same thing as reasonableness in a federal statute with one exception that where the federal statute is specific and tells you what you can and can't do you follow. It's probably a generality. It probably just doesn't help but anyway.

MR. JOSEPH: If your Honor in the small binder would just turn to tab seven since Mr. Ellis was pointing to the Aviation Improvement Act of 1990. It is not very long. I would simply point out that neither in this act nor in any other is there any expressed preclusion of the state common law standard.

THE COURT: No. Clearly there is -- well, again it's abstraction. Where something is specifically stated you can't have something that's different and whether you call it a pre-emption but intent or pre-emption by affect is not very important to me.

MR. JOSEPH: There is a line of cases the Supreme Court in Hillsborough or R.J. Reynolds that says that agencies in Congress know how to pre-empt when they want to.

THE COURT: All find language that says something else.

MR. JOSEPH: But the FAA has pre-empted the area of drug testing and the Drake case in the Second Circuit pointed that out the. The Aviation Security Act of 1990 was in response to Lockerbie bombing. Nothing had anything to do with pre-emptions. The ADA, the Deregulation Act is an economic regulation act and it precludes. It pre-empts rates, roots and services. So we have the Supreme Court saying you can't effect those.

Nothing in any ATSSA verdict is going to effect rates, rooms and services. We have completely insulated defendants which is why the Price Anderson parallel, I'll say two things about that, first, the language isn't identical. Their breach says the language isn't identical. But the context isn't identical either. We have complete protection of this industry because any award is limited to insurance.

And the third point I'd make is --

THE COURT: Well, it's parallel.

MR. JOSEPH: When the same language is used in different statute, but damages under the Clayton and RICO Act is both limited to business or property. Under the Clayton Act it means competitive. Under RICO it means anything. So I think we have to look at this statute and we know --

THE COURT: Mr. Ellis, the point I take from Mr. Joseph is that the standards of what should have been done at the check points were minimal standards and that in various

circumstances more could be done, more can be done, more may be required to be done and I am not interested in whether it's a federal reason for more or a state reason for more, but more could be done. Are you saying something different?

MR. ELLIS: Yes, your Honor.

First of all, Mr. Joseph omits from his brief and from his presentation the provisions of the Aviation Security Improvement Act that we discussed after the break which said, not the airlines, but the FAA and logically the FBI, by the way, injunction with the intelligence community of the United States assess the threats.

THE COURT: Depends now what are the circumstances that make it a threat. I am told on this motion that nine out of the ten people were identified in the computer as raising a suspicion but I don't know why and I don't know whether it should have been noted or not noted at the check point or not. The question, I think, is a little question of begging and that's why I am kind of resistent.

MR. ELLIS: Something more should have been done for those nine people.

THE COURT: Sure. In the appropriate circumstances if a perception of threat were involved should something more have been done?

MR. ELLIS: May I first say one I thing, your Honor? Like you sure as heck like when it gets specific and I wish

they had been this specific before we came to court today, because one of the things I would have brought to Court, your Honor, is the testimony of Captain Edmund Soliday who appeared before the 9/11 commission and was asked about profiling 9/11 and what you could do.

THE COURT: This is another day. I started to open this open with Ms. Goldman and she told me to stay away from that.

MR. ELLIS: The point of the matter is, your Honor, the answer is when we get specific, no, you couldn't vary and profile more and if we want to get into a factual inquiry about that we'd be happy to do that.

THE COURT: Now, if Mr. Ellis is right on facts because it fits squarely into a regulation then there is pre-emption.

MR. JOSEPH: Your Honor, that regulation states what is required, but in any event the CAPPS system which we haven't had full discovery on, we don't have information. which -- was developed voluntarily by the airlines permitted agent, ticket agents to put people into the system and that was done on at least one instance in a case. There was discretion built into that system ticket agents put a --

THE COURT: So that if there was discretion built into the system then I have to instruct the jury how to exercise discretion. How to review the exercise in discretion. It is

a -- just I am confused about what I have to do. What do you want me to do, Mr. Ellis?

MR. ELLIS: Your Honor, yes.

Your Honor, quite frankly I agree with you when your statements when we're discussing things in the abstract. I would say what they need to identify today is in order to award a damage remedy, have the right to regulate conduct differently than what the federal system required.

THE COURT: I think the answer to that is, probably no, but absolutely I won't say and whether --

MR. ELLIS: I liked the first answer.

THE COURT: Probably we are looking at the federal sources. But you know the federal sources bounce right back into the state sources.

MR. ELLIS: Except for one thing when we bounce back into a state remedy then we --

THE COURT: Not state remedy, state standard. Remedies are different. Remedies are how much damages you award. We're not talking about that now.

MR. ELLIS: Right. But what is the standard for conduct? And in fact the states do not impose liability for doing what the airlines were doing at the airports. We are referring to those as minimums, your Honor.

THE COURT: What the states say is that any person causes injury to another by doing something or failing to do

something which in the circumstances is unreasonable and negligent the damages have to be paid. I may have stated it wrong, but, basically, I think you get the drift of what I am saying.

Here with a large overlay of federal regulation we certainly have to pay attention to what is federally required and to some extent it may be preclusive and to some extent it may require the exercise of discretion and if it does require the exercise of discretion, how that discretion was exercised or if it was failed to be exercised whether the failure was negligent is a question that the jury will have to decide. And if it comes to elaborating on the definition of how to exercise due care in the circumstances, both of you are going to be giving me cases that probably arise under state law because they're not too much federal law on the point. And I don't know that I can say anything more useful than that.

MR. ELLIS: I appreciate what you've said, your Honor, and I guess that the first point is simply one that I think you've indicated. You probably see the way that we see it which is that the states don't have the right to regulate. Where it gets tricky is --

THE COURT: You are enlarging now.

MR. ELLIS: Where it get's tricky, of course, is when there are built into what the federal program requires some

area of discretion. I would like at some point if we get specific about those thing. We could decide whether or not there actually was discretion because there seems to be --

THE COURT: I think it's going to be left to another day.

MR. JOSEPH: Your Honor, it's one o'clock. I think you've said everything I could usefully say unless there is a particular area. Let's talk off the record about this afternoon.

(Discussion held off the record)

THE COURT: Can you do your brief rebuttal now?

MR. PODESTA: First of all, with respect to source of the aviation regulation screening authority that is contained in 44903.

THE COURT: I understand.

MR. PODESTA: Which is not the statute Mr. Joseph read. This is a 1974 enactment that deals with the administrator for prescribing regulations to protect passengers and property on aircraft operating in air transportation against an act of criminal violence or aircraft piracy. The statute didn't exist at the time of the Williams case or the events in the Williams case.

THE COURT: What is the difference?

MR. PODESTA: The difference is this statute doesn't talk about highest duty of safety. It talks about protecting

passengers and the public interest in promoting air transportation and interstate air transportation. This is 44903. And it talk about to the maximum extent practical requiring a uniform procedure for searching and detaining passengers or property to insure that their safety courteous and --

THE COURT: But the FAA knowing about this issues an educational bulletin just before September 11 which talks again about minimum standards.

MR. PODESTA: In the sense that there is -- that's just a reference to the common sense element.

Second, even minimum standards aren't pre-empted as Abdulla has found, as --

THE COURT: Even minimum standards.

MR. PODESTA: Even standards that can be described as something a defendant can voluntarily accede have pre-empted effect under the decisions affecting the Federal Aviation Act.

THE COURT: First of all, what do you mean by voluntary.

MR. PODESTA: Our position, let me make it very clear, is that the cog and the ACSSP set forth the legal standards that we were obliged to follow.

THE COURT: You are saying that the minimum standard is the satisfaction of reasonableness.

MR. PODESTA: The ACSSP and the cog define

reasonableness for purposes of the Stabilization Act or ATSSA.

THE COURT: What you would say is the definition of reasonableness, Mr. Joseph would say is the minimum standard.

MR. PODESTA: Right. And there are numerous -- those cases, the cases that Mr. Ellis cited, Abdulla and Green and four district court decisions in this circuit since Lockerbie have found pre-emption of the very FAA, by the very FAA aviation standards.

THE COURT: Suppose I agree. What different does it make? The difference is that still there's a common sentence standard that comes right back in and whether I call it a Cardoza standard or a U.S. standards makes no difference.

MR. PODESTA: It makes a great deal of difference and the reason why we're having trouble discerning that difference today is when we gave specific examples of what the plaintiffs were saying in deposition, this is what you should do. And we pointed out in our opening brief how the FAA regulations basically set forth different rules. They made no response. They were completely silent. They have never identified what it is they say we should have done above the supposed minimum. They hint in their deposition questions that we should have had an intensive interview program, behavioral profiling such, as el al, but that is entirely outside the federal system and it involves an entirely different approach.

THE COURT: Are they required to specify what you

should have done.

MR. PODESTA: I think that they should be -- how can we have effective discovery? How can your Honor make rulings on critical issues until they say, look, this is what you should have done beyond that which is specified in the cog, in the ACSSP.

THE COURT: Mr. Moller, should you be required to respond to a bill of particulars at this point.

MR. MOLLER: I think the answer to that is, no, until we get some additional discovery which you had informed us precisely how to respond.

MR. PODESTA: The chicken and the egg, Judge.

THE COURT: Mr. Podesta, we have decided to put this up for decision at this point. But it's part of the frustration I think that permeates that discussion. You want to know what the contentions are so you can rebut them. They don't want to tell you till they finish discovery, federal rules side with Mr. Moller but I have discretion to modify.

MR. PODESTA: And your Honor recognizes the March 22 conference is that it was important to key these issues up. In our opening brief we gave six or seven examples such as behavioral profiling, extensive hand waning, putting special scrutiny on Arabs and Middle Eastern people and we pointed each of them reason afoul of the federal regulations and should be -- they didn't respond at all.

THE COURT: I think what you do to me now, Mr. Podesta, is illustrate why I feel frustrated because there is nothing specific on which to rule. I find what has been done this morning extremely important and extremely helpful in my understanding of the respective positions, but it's nothing on which I can rule.

I feel at this point in time that I am not going to make a ruling and as I do with motions in limine I give you my indications and reserve complete freedom of action on the trial. When the facts are clear and specific and something is tendered to me for decision, I'll rule. But in this kind of an amorphous record I find the motion --

MR. PODESTA: That creates enormous practical difficulties as for the scope of discovery to be conducted and for the scope --

THE COURT: Why don't you tell me that after lunch. You'll be first up.

(Luncheon recess)

(Continued on next page)

THE COURT: Roger Podesta for the aviation defendants.

MR. PODESTA: May I begin?

THE COURT: Go ahead, Mr. Podesta.

MR. PODESTA: You will be glad to know, your Honor, I did not take advantage of this interval to come up with more comments.

My first point is with respect to the F.A.A. websites and the travel and correspondence, these are obviously not official statements of the F.A.A. and they are obviously entitled to a great deal less weight than the actual text of the ACTSSP or the cog in which the F.A.A. approved and which was in use for many years.

But, most importantly, they don't address the critical issue before this Court which is not whether the aviation defendants can sometimes exceed the F.A.A. requirements but whether the states can require the aviation defendants to exceed the federal requirements.

THE COURT: That's not an important issue because the answer is clearly, "No," and no one is urging that that happened.

MR. PODESTA: All right. Well, thank you. I was going to cite the authorities in our brief where the F.A.A. has taken official positions endorsing Abdella including their own administrative rule in the Fairview case saying the states have no role.

THE COURT: The bottom line is what do you want me to rule on? What practical decision do I make on the basis of the decision?

MR. PODESTA: I think at the time what we would like from your Honor is a ruling that federal law controls where it --

THE COURT: I'm not going to make that abstract ruling. If there is a piece of evidence that I have to rule on, there is a jury instruction that I have to rule on, I will rule. But I'm not going to pronounce a statement of law which has no practical implementation.

MR. PODESTA: Well, I think it would be very useful through the course of discovery in this case and particularly in developing experts if we had some idea of the jury instruction that your Honor would propose to give.

THE COURT: If you want to have a procedure to formulate jury instructions, I will be glad to participate in that when it is appropriate and it will be when the evidence is completed or perhaps before you make final choices of experts. I will be agreeable to that. As you know, I will do whatever has to be done to move the case.

This has been a very useful exercise because I've learned the issues, I have seen the respective positions, I have heard respective arguments and I have a certain set of ideas as to how this case has to be shaped and I think I've

expressed that in terms of argument. I have not ruled and I do not intend to rule unless there is some practical implementation that is at hand. And there is none.

MR. PODESTA: I think the starting of a process as to how to develop jury instructions would be very helpful, particularly before we get into experts because right now one of the issues that troubles us is the plaintiffs can contend that state common law required that we develop an El Al system for --

THE COURT: Mr. Podesta, let me -- time is precious and I want to be a little more efficient than I was this morning.

You have pointed out that the plaintiffs have not stated their contentions as to what you should have done and did not do, or in what respects you didn't do something you should have done.

Until they do that there are no instructions to give. At some point they're going to have to do that. We'll get to that and you will have rulings when that comes about.

MR. PODESTA: I would then just add -- and this will lead into Wayland -- that if we don't have guidance on what the arguments the plaintiffs can make state law says we should have done, we are going to have to take more discovery from the government as to why it made the decisions it did.

THE COURT: We will get to that in the next part.

MR. PODESTA: Thank you for your forbearance.

THE COURT: We are now finished with the first topic and ready for the second topic which has to do with discovery. The topic is whether aviation defendants should be able to discover from the government pre-September 11th intelligence and other threat information known to the government but not conveyed to the aviation defendants.

Mr. Joseph Wayland will speak for the aviation defendants.

MR. WAYLAND: Thank you, your Honor.

Joe Wayland, Simpson, Thacher and Bartlett for Argenbright Security and for the aviation defendants.

Your Honor, I want to start with what I think is the false premise of both the government's brief and the plaintiff's brief and that is the following: That our liability depends solely on what the defendants knew and what they did. They cannot and they do not support this proposition with any authority. They do not cite to any principles of authority law and they can't because that proposition is directly contrary to the basic principles of tort law and evidence and it is contradicted by every single case that is ever considered what defendants are allowed to prove at trial to defend themselves in negligence cases.

Your Honor wanted to be specific, I'm going to get very specific very quickly. Let's turn first to the issue of

proximate cause.

It is a fundamental principle of tort law that defendants are permitted to show that events and circumstances beyond the defendant's actions are the substantial cause of the plaintiff's injury. That's horn book law. There is nothing in the plaintiff's brief or the government's brief that says otherwise.

This is what the restatement of torts says and it is what courts across the country have said and we cited to it. Let me just read one section from the restatement that makes it pretty clear. Some other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant and therefor to prevent it from becoming a substantial factor.

So, too, although no one of the contributing factors may have such a predominant effect their combined effect may, as it were, so dilute the effects of the actor's negligence as to prevent them from being a substantial factor.

The Court emphasized -- the Court, and I mean you, your Honor -- emphasized this principle in your September 2003 decision and in which you recognized that the actions of others may, quote, so attenuate defendants' negligence from the injury that responsibility for the injury may not be reasonably attributed to the defendant. And I think your Honor, this

morning, essentially said the same thing.

So, I think there is no doubt that we are entitled to show evidence of circumstances other than defendant's own actions. And there is also no doubt -- and I will get into the specifics now -- that the government intelligence regarding terrorist threats and the government's actions in response to those threats is directly relevant to proximate cause.

I have a number of examples, your Honor. Let's start with the first one, and it has to do with a critical issue that you, yourself, identified in the 2003 opinion. You said that liability may turn on, quote, who was best able to protect against the risks at issue. Who was best able to protect against the risks at issue. We think that is a critical issue and it goes to proximate cause.

How does government intelligence play in? Congress charged the FBI and the F.A.A. with the statutory responsibility to assess terrorist threat against the domestic air transportation system. That's 49 U.S.C. 44904. It was cited this morning by number of counsel.

The statutory instruction is explicit. The FBI and the F.A.A. are required to assess the extent to which there are individuals with the capability and intent to carry out terrorist or related unlawful acts against the domestic aviation system and the ways in which those individuals might carry out those acts.

The FBI has a duty to identify any top terrorists that are in the country and the F.A.A. has the responsibility to determine the procedures and equipment that will most effectively deter those terrorists.

Based on this statutory authority we should be permitted to show that the best way to prevent the sophisticated attacks by terrorist organizations such as Al Qaeda is to identify the plots in advance and to take action to eliminate the threat.

In fact, your Honor, is it all right if I approach and hand up something?

THE COURT: Sure.

MR. WAYLAND: I want to hand up to your Honor two excerpts from the 9/11 Commission report. If you turn to page 83, your Honor.

THE COURT: Hold on, Mr. Wayland.

MR. WAYLAND: Thank you, your Honor.

Your Honor, I ask that you direct your attention to page 83 of the 9/11 Commission report. The second full paragraph on that page begins with the phrase "The F.A.A.'s policy was to use...

Do you see that, your Honor?

THE COURT: Yes.

MR. WAYLAND: I will continue: The F.A.A.'s policy was to use intelligence to identify both specific plots and

general threats to civil avation security so that the agency could develop and deploy appropriate counter measures.

So, I think what the Commission is explicitly acknowledging is that government intelligence was a critical component in the nation's efforts to stop the kind of attack that was visited on the United States on September 11th.

We should be permitted to show further that despite having substantial information about an impending attack by terrorists against the U.S. in the months leading up to September 11th, the government was unable to identify the specific threat and could not stop the attacks.

And I want to direct your attention, your Honor, to the second excerpts from 9/11 which I just handed up because I think it is very important that your Honor understands the extent and the type of information that we are talking about.

If you would look at page 255, your Honor?

THE COURT: I have it.

MR. WAYLAND: Under the heading, The Drum Beat Begins -- and, by the way, your Honor, this chapter is entitled, The System was Blinking Red. It is Chapter 8. I think it is one of the most significant chapters in the report and critical to understanding what our defense will be, your Honor, and it also is critical, as we talk today, about what specific threat information we expect to receive from the government. And it is also critical to show that this is the

type of information that the government has already decided as a general matter it is okay for the public to have an understanding of. So, this we will get to later on but it goes to the issue, the fact if we are creating a burden for government.

To return to the test. In the spring of 2001 the level of reporting on terrorist threats and planned attacks increased dramatically to its highest level since the millennium alert. At the end of March the intelligence community disseminated terrorist threat advisory indicating a heightened Sunni extremist terrorist attacks against U.S. facilities --

THE COURT: It is better, actually, if you speak more slowly.

MR. WAYLAND: Your Honor, a heightened threat of Sunni extremist terrorist attacks against U.S. facilities, personnel and other interests.

If you turn the page to 257 the first -- second full paragraph, a terrorist threat advisory distributed in late June indicated a high probability of near term "spectacular terrorist attacks resulting in numerous casualties."

And then it goes on to refer specifically to Milan attacks may be imminent and so on.

And there are a number of other excerpts I don't want to burden the Court with now but I do want to turn to the

evidence, based on government intelligence, as to what happened next and that we go, your Honor, to page 263.

THE COURT: Yes.

MR. WAYLAND: And here the report goes through what the government response was to the threats and, basically, and the Court has it, but the thrust of this is the government had a substantial amount of information and yet it didn't know what to do about the information. It had much more information than any of the defendants did, certainly.

The summation was really in the bottom paragraph.

THE COURT: I will take judicial notice of that.

MR. WAYLAND: The summation, your Honor, is at the bottom of the page. The September 11th attacks fell into a void between foreign and domestic threats. It goes on later on that domestic agencies were waiting for evidence of a domestic threat from sleeper cells. No one was looking for a foreign threat. The threat was coming from -- that was coming was not from sleeper cells, etc.

And then, on the next page, I think also very important, the report says, A second cause of this disparity in response is that domestic agencies did not know what to do and no one gave them direction.

This, despite all of the threat information that's set forth in documents like the 9/11 Commission report.

THE COURT: Can I digress?

MR. WAYLAND: Yes.

THE COURT: Suppose you wanted to introduce this statement: A second cause of this disparity is that the domestic agencies did not know what to do and no one gave them direction.

Under 803(8) of the Federal Rules of Evidence, could I allow this in?

MR. WAYLAND: I think there are a number of issues, your Honor.

First of all, I would --

THE COURT: That was if one was, of course, prompted to be prepared for this.

MR. WAYLAND: I could quote an eminent jurist who said, "Stay away from secondary sources."

So, as a matter of trying a case to jury, your Honor -- that was from Hellerstein -- but as a matter of trying a case to a jury, your Honor, that's a very separate issue. Do I want to put it in through statement or do I want the government witnesses to be able to get on the stand and say these are the facts that we knew, these are the conclusions we reached, and these are the actions that we took.

So, I think that the parties will have a lot to say about how much of this report comes in when the time is appropriate. I would argue that this comes in.

THE COURT: Good answer, Mr. Wayland.

MR. WAYLAND: Anyway, so I think, your Honor, what this tells us -- this sort of information tells us is that the government had substantial information -- let me start at the beginning.

The government was charged with assessing threats. It was their business to go out and look and decide what the threats were. They did that. There was a lot of information out there that wasn't conveyed to us and the government took certain actions and didn't take other actions. And we think when the jury is asked to decide what's the proximate cause of what happened on 9/11, they need to hear not only the testimony of Hermie Miller. And let me talk for a moment about Hermie Miller because that's a witness who Mr. Joseph referred to in his argument this morning.

First of all, she was security screener for Flight 93 not flight 77, but Hermie Miller is a retired, inner-city, Newark grandmother who has raised a family and she worked at Newark on the date in question. And she was deposed by the plaintiffs and the thrust of the deposition, as far as I could tell was, did you know who Osama Bin Laden was? And remember Mr. Joseph said no one knew who he was. We had to go through a whole hour of this.

THE COURT: Slow down.

MR. WAYLAND: Yes. We had to go through a whole hour of: Did Hermie Miller know who Osama Bin Laden was? Did

Hermie Miller know about these attacks in Paris 10 years ago? Did Hermie Miller know about the Bojinka plot? And then we have to find out her exact interpretation of the cog is the same as Joe Smith in Newark or Ronald McDonald in Dulles. Do they all have the same interpretation.

And if that is what the case is about, if that's all the jury gets to hear it will be a very different world and a very unfair world and very unrealistic world.

THE COURT: What makes you think that I would allow those questions?

MR. WAYLAND: I hope you won't, your Honor. I don't think they should be allowed.

But, in any event, when the jury is asked to decide whether it was the activity or conduct of any particular defendant individually at a check point or collectively through the procedures that they had in place, I think the jury is entitled, under basic principles of proximate cause, to be able to consider other factors and those factors, by statute, are the government's action and the government's knowledge that led to whatever action or inaction it took.

Let me give you a second example of proximate cause that I think is relevant.

We think that the government's knowledge of the terrorist threat will show that this sophisticated, dedicated and ideologically driven nature of the threat and that these

groups planned and executed attacks that take advantage of existing vulnerabilities in a targeted security system and do not depend as a modus operandi on the negligence of the victims.

The 9/11 Commission report says that the 9/11 terrorists were instructed to use weapons that were not detectable. We should be able to show that the government had knowledge about the nature of the terrorist threat and the modus operandi of terrorist organizations. And it is particularly important because, as far as we know, there is no direct evidence of how the terrorists succeeded in getting items on board the aircrafts that could be used as weapons and whether they had any other means to achieve their objective if any particular items had been confiscated before the highjackers boarded the planes.

One final example, your Honor, on proximate cause. The 9/11 Commission noted that the government's avation security strategy assumed that the highjackers would not undertake suicide missions. They expected the attacks would be bombs on planes placed on there and then the terrorist leaves and doesn't go on the plane. That view actually underlies key aspects of the avation security system.

For example, the decision not to fight the highjackers was based on that decision. The decision that not to have a system that could prevent any possible item that could be used

as a weapon was not included -- was not part of the system. And we think that the government's decision, which was clearly based on its intelligence --

THE COURT: Mr. Wayland, were those simply not done or were they pursuant to a decision not to do?

MR. WAYLAND: I think what the evidence will show, your Honor, is that the -- and what we have to go on right now is mostly the 9/11 Commission report is that the -- and some other documents too, but that the government considered the various threats. They explicitly determined that suicide highjacking was not a high priority and they designed a system that focused on the threats that they did recognize which were the remote bombing.

THE COURT: Is there any evidence to believe that the government made a deliberate choice not to pursue methods of detection in dealing with, say, suicide bombers?

MR. WAYLAND: Your Honor, I can point you to sections in here that we can then go find the government witnesses to sponsor; but, yes.

If you look at page 83 of the report -- I think it is 83 -- I can find it -- on 84, your Honor. I will just read it to you. It is talking about the CAPS procedures which were discussed this morning and why they were set up the way they were. And what it says is this policy change, meaning an affirmative act, was also reflected of the perspective that

non-suicide sabotage was the primary threat to civil avation.

So, yes. There is evidence to support that there was an affirmative determination to take certain steps in the security system based on a belief, government intelligence, as to what the most likely threat was.

One final point about proximate cause, your Honor, and then I will move on to reasonableness. One of the issues on proximate cause, I think, is the nature of the plot itself. And the government, as you know, has agreed that it will not raise relevancy objections as to what the government knows, apparently, about the planning and execution of the plot as well as the nature of the security system.

So, there is going to be government discovery and I think that's a key -- a key -- factor to keep in mind, your Honor. There is going to be extensive government discovery because the government has agreed to it.

One of the problems was if you were to carve out this exception for government intelligence about the terrorist threat not known to the avation defendants would be the following: I think it is very hard in practice to decide whether some of this material goes directly to the 9/11 plot itself or more generally to what the government knew about terrorists and the Osama Bin Laden organization.

Now, I would argue, obviously, that most of that is relevant to the plot itself. I can see debates with the

plaintiffs and perhaps with the government about whether a particular piece of evidence goes to the plot and its implementation or whether it goes to, "the general knowledge the government has."

So, I think adopting what the government wants and what the plaintiffs want would actually cause more problems than it would --

THE COURT: What does the government want? Say that again.

MR. WAYLAND: One of the objections that the government has raised to our request is that it is going to create a problem for them because they're going to have to decide whether certain evidence is -- is subject to a national security privilege or otherwise privileged. And I guess my issue here, your Honor, is that they're going to have to do that anyway with respect to information about the 9/11 plot because they say they're going to produce that sort of information to us.

So, it is not a substantial additional burden since it most likely will be the same witnesses and many of the same documents for them to make that determination with respect to the small cash out that they're trying to make.

Let me talk about reasonableness just for a minute, your Honor. And it follows on from everything that was discussed this morning and one of the difficulties in deciding

what it is that ultimately is going to be put before the jury. But, as Mr. Josephson suggests --

THE COURT: Joseph.

MR. WAYLAND: Mr. Joseph suggested.

THE COURT: Josephson is a partner, used to be a partner.

MR. WAYLAND: I actually worked for him as a summer associate which is why I confused the two. But yes.

THE COURT: You went on to a distinguished career with the attorney general.

MR. WAYLAND: Right.

We think it is pretty clear why government intelligence would be directly relevant to the kind of reasonableness case that the plaintiffs apparently want to put in against us.

The theory is that we should have done something more. And we can debate what that means but we should have done something more. And it seems crystal clear that in judging whether we acted reasonably in doing whatever it was that the plaintiffs say we should have done, to take into account what it was that the government knew about the terrorist threat and what it required the defendants to do and what actions it took in response to these threats.

We think that's pretty clear and it is hard to imagine any way to come back at that.

I want to spend a little bit of a moment on taking that one step further which is, if you were to cut back a little bit on what the plaintiffs want to do and say, look, what matters is whether you substantially and reasonably complied with the federal regulations, which is where we think the instruction ought to be at the end of the day, my question is, is it still relevant? Is what the government did still relevant? And it is precisely because, as your Honor recognized, there is an amount of discretion even within the federal regulations.

So take, for example, what we talked about this morning, the idea that the regulations prohibit menacing knives.

THE COURT: Men --

MR. WAYLAND: Menacing knives.

THE COURT: Menacing knives. Okay.

MR. WAYLAND: I don't know the exact language but four inches is the general rule unless otherwise menacing. So, there is judgment involved in whether the knife is menacing or not.

So, the question is how do you judge whether what we did was sufficient to satisfy our standard under the government regulation unless we can use the menacing as an example.

On the one hand we have evidence that was available to the defendants which is we knew that for decades what we were

doing was working in the sense that we had prevented highjacking, domestic highjacking for decades, so we will be able to tell the jury that that was a reasonable basis perhaps not to do anything more than what we were doing.

We also think we ought to be able to tell the jury the following: The government was responsible for these regulations. The government had F.A.A. people in the airport supervising us every day. The government knew what the threats were. The government also new what our performance was.

So, the government knew, for example, that there was never 100 percent certainty in stopping all the prohibited items. The government knew about a lot of other problems that came up in the system. And the government also knew what was out there, what was making the system blink red for months and months and months before 9/11.

And the fact that the government had that information, knew what was happening at checkpoints with all its flaws and all its excesses and determined not to require any changes within the federal regulations, we think, goes to the reasonableness of our actions.

THE COURT: But, this dysfunction of government administration, therefore, is an excuse for your own negligence generals?

MR. WAYLAND: No. Not at all, your Honor. It has nothing to do with an excuse. It has to do with the

reasonableness of our action. It has to do with whether people sitting in a jury box.

THE COURT: The dysfunction of somebody else?

MR. WAYLAND: It is not dysfunction. It is function, we are not --

THE COURT: The conclusion of that 9/11 report was that the government was dysfunctional.

MR. WAYLAND: Right. But that's not the issue for which we want the evidence and that's not the issue that we are putting before the jury.

The issue we are putting before the jury is whether those actions, however you want to describe them, you can call them bad, you can call them good --

THE COURT: You are creating a deliberation on the part of the government when the 9/11 commissioners thought it was a dysfunction?

MR. WAYLAND: I think -- I don't think it matters how we characterize what the government did. I think what matters is that we have the information that's described in the report --

THE COURT: It seems to me a matter a lot that you are going to create a separate trial longer than this trial.

MR. WAYLAND: Not at all. Not at all.

THE COURT: Tell me about limits.

What do you propose? How many depositions? How many

documents? How many proceedings with the TSA? How many issues of SSI? How many appeals to various Courts of Appeals throughout the country? Much delay in these cases getting to trial?

Talk to me about that.

MR. WAYLAND: I think that's a great place to go, your Honor. And, again, let's start with the premise that the government has accepted that we are entitled to a fair amount of discovery already so a lot of those things are going to happen.

THE COURT: I have noted that in how much delay it has caused already.

MR. WAYLAND: So it is going to happen.

THE COURT: The full employment policy from Ms. Goldman and Ms. Norman notwithstanding the full employment policy of about 15 other matters at least.

MR. WAYLAND: It is going to happen, your Honor. The only question is whether what we want is going to add.

THE COURT: No, it is not going to happen. It may happen.

MR. WAYLAND: Right.

Well, so far the government says it is going to happen. We would like it not to happen. If they can give us the stuff, we can come back and be done.

THE COURT: The government is not the judge.

MR. WAYLAND: I know.

The question is, your Honor, what do I see happening next and how quickly can we get it done. Here is what I think and I have thought about this a lot:

I think once we get this issue of what we can see and not see resolved, we will sit down with the government with this book and several other government reports and say this is the type of information we need to get in front of a jury.

THE COURT: This book is the 9/11 report?

MR. WAYLAND: I'm sorry, your Honor; the 9/11 report and similar documents. This is the type of information we want and it is not a lot. We have summarized it in our briefs. The report itself identifies the number of witnesses who purport to be the sources of this.

THE COURT: How many?

MR. WAYLAND: I would say my estimate is the same as it was last time, 20 to 30.

THE COURT: Mr. Barry, how many depositions have you told me you wanted? 65?

MR. BARRY: Of the parties? We said at least another 65, from them. They wanted it of us. That's what the plaintiff wants of us.

THE COURT: You want 65.

MR. BARRY: No, plaintiff wants of us, of the defendants. That's what they said this morning.

THE COURT: Mr. Moller, I don't remember that number being used.

MR. MOLLER: The numbers are a surprise to me and I don't think I could stay awake for 65 depositions.

THE COURT: Well, I do know --

MR. BARRY: They gave us a list of 130 so I cut it in half.

THE COURT: I think I woke you up. It is not Saturday morning, Mr. Moller. It is still Thursday.

Mr. Barry, what are you talking about? You have a Sunday function, he has a Saturday function.

THE COURT: To cut this short, I don't have any confidence that the numbers will be limited to 20 or 30. I have every reason to believe that the numbers will be considerably more and a multiple of those.

MR. WAYLAND: Not for government witnesses, your Honor. I don't think so. And, your Honor, that's an issue of burden which we can resist if we take advantage of this.

THE COURT: This issue is all 403. You know under Rule 26 of the Federal Rules of Civil Procedure anything that's useful in effect is a bound of discovery. And since usefulness is very much subjective to a party, it tends to be very little in the way of limits to discovery responsibly pursued.

MR. WAYLAND: You can set those limits, your Honor.

THE COURT: It is not so easy.

Under Rule 403 of the Federal Rules of Evidence I have to worry about something else. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Leaving aside various of the characteristics here, what you are asking me to authorize is another trial of the government.

MR. WAYLAND: Absolutely, not, your Honor. Absolutely not.

THE COURT: And I do not wish to do that.

MR. WAYLAND: That is absolutely not true, your Honor. And I think the wording of that rule is precisely on point. It talks about unfair prejudice and confusion. And if the jury is not permitted to hear what the government knew and then what it decided to do or not to do, we will be severely prejudiced because it will create a false world that didn't exist on 9/11 and it will put us at a substantial disadvantage and I think it would be a serious error to put us in that position.

I think the burden is overstated, your Honor. This is the only discovery, essentially, the defendants are taking. They've had all of the -- because that's what matters to us because we were part of a system. We were part of a system in which the rules were dictated to us by statute, by the

government, and a threat assessment --

THE COURT: Dictation is not a problem because that's information conveyed.

UNIDENTIFIED SPEAKER: That's right.

MR. WAYLAND: I'm sorry, your Honor?

THE COURT: I don't need to have confirmation from plaintiff's bench, please. So far I'm doing all right.

That's information that's conveyed. Nothing that prevents you from taking discovery of information transmitted to you.

What you are looking for is information that was not transmitted to you.

MR. WAYLAND: Because that's critical in understanding the reasonableness of our actions and the proximate cause.

If the government had this information it couldn't stop the terrorists. The idea that Hermie Miller and people like her could stop it, it just makes no sense. So, it is critical to us, your Honor, for that reason.

THE COURT: Thank you, Mr. Wayland.

Who will present the government's position?

MS. GOLDMAN: Beth Goldman.

Your Honor, I would like to start with the issue of the burden because I think that one of the things Mr. Wayland has done today and in their papers is to underestimate, to the extreme, the burden that's going to be imposed on the

government by the discovery they seek.

They try to describe it today as something --

THE COURT: While you are describing burden on the government, talk to me also about the delay to the Court and the burden to the Judge.

MS. GOLDMAN: Certainly.

They describe it as limited and narrow, not burdensome. And, in fact, they are seeking discovery so far not only from the F.A.A. And one of the lessons of Mr. Wayland's statement is that no good deed goes unpunished because we have agreed to provide certain limited discovery on issues that are clearly relevant here.

THE COURT: I'm going to take issue with good deeds. You do what is necessary, Ms. Goldman.

MS. GOLDMAN: We are doing what is appropriate and then we are told, Well, it can't be much more of a burden to go way beyond that.

But, of course, it is. Because they've asked not only for information from the F.A.A. but from three United States intelligence agencies, the CIA, the FBI and the NSC. And they seek from those agencies a wide ranging topics of inquiry. And we don't yet have all of the requests. We can only --

THE COURT: What is NIC?

MS. GOLDMAN: NSC, National Security Council.

We don't have all of the requests but we have some and

the requests include things like they want CIA and FBI information and NSC information on pre-September 11th threats to civil avation. They want what the CIA and FBI had before 9/11 on Osama Bin Laden. They want what the CIA and the FBI had on Al Qaeda. And they want all of the federal agencies information about the highjackers. And then, in their papers, they admit that they may want to pursue other leads based on the information that they may get.

So, this must be the tip of the iceberg if there is any more.

Now, beyond that they have said consistently that they want 20 to 30 government witnesses. Now, 20 to 30 government witnesses including multiple 30(b)6 witnesses is not the equivalent of 20 do 30 screeners who have a limited amount of information. What they want are witnesses from the CIA, for instance, to talk about raw threat information that they had and what was done with that threat information.

This is the kind of discovery that will require the government to spend countless hours and days finding information and then preparing witnesses. And, add to that, that these are very sensitive areas of inquiry. These are areas where there is classified information --

THE COURT: Suppose the government decides that it does not want to give this information. Where is their recourse?

MS. GOLDMAN: Well, what the government will do is respond to the requests and, as we have agreed to the parties, the next step would be would be if we were to say "No" in the Touhy response the parties would be to disagree to challenge that Touhy comes --

THE COURT: That comes to me?

MS. GOLDMAN: To you under the APA.

THE COURT: Well, Touhy is not APA.

MS. GOLDMAN: Well, it would be to you because we have agreed not to insist that they go to the fourth circuit or any other circuit where the agencies may be cloaked.

THE COURT: So, I would expect a weekly, long letter under my individual rule 2E asking me to rule on various questions?

MS. GOLDMAN: Well, we would have to discuss whether you believe Touhy because -- because the way you do it for this is for them to file an action that's related that's an APA action challenging the Touhy denial.

THE COURT: File an action under the administrative procedure act.

MS. GOLDMAN: Right.

THE COURT: They can do it here or they can do it in the District of Columbia.

MS. GOLDMAN: Right. Although we did agree with the parties in order to avoid having to force everybody to do that,

that they would all agree to do it here, if that's okay with your Honor.

THE COURT: And so I get a separate petition and it comes to me as a related lawsuit and I rule on that and that's not so easy because if I have to rule on information that has very high classification, I may not be able to easily see this information. I may not be able to have my law clerk view this information. I may get into a fight with the government on whether or not my law clerk has access to this information. We may not have a court reporter who is cleared to see this information. The information may have to be viewed in a sealed room in the Department of Justice. There may be problems with a record. There may be efforts by the government to summarize the information. We would have problems of clearing how many lawyers in this case?

We have spent several weeks dealing with -- weeks, months, dealing with the lawyers in this case. But that's very simple for me to do, handle that very easily without affecting the timing of these proceedings. Right.

Mr. Wayland?

MR. WAYLAND: Actually, no, your Honor. And I think you have it, with all due respect, wrong for the following reasons:

What we have said is that we want information that the government has already said is publicly disseminated. What I

want to do is sit down with her and find the 10 witnesses, if that's what it takes, to get this stuff into evidence. That's about 10 witnesses.

THE COURT: If information is publicly disseminated there may be techniques of getting that information in without having to go through the risks of these kinds of proceedings.

I have been through these proceedings, Mr. Wayland. I speak not from hypothetical reasoning.

MR. WAYLAND: I appreciate that, your Honor.

Then I would say the ruling then --

THE COURT: I had a fight with the U.S. Attorney's office -- not U.S. Attorney but the Department of Justice of whether one of my rulings on which I wrote could go into the federal law books.

MR. WAYLAND: Your Honor.

THE COURT: I won.

MR. WAYLAND: Clearly, I think I have suggested --

THE COURT: I'm the Judge.

MR. WAYLAND: I suggest this can happen in a way much more expeditious than you are contemplating.

THE COURT: If there is a mutual will, there is a way.

MR. WAYLAND: There is a way, your Honor.

THE COURT: If there is not a mutual will, it is very difficult, Mr. Wayland. Very difficult. And it should be very difficult.

MR. WAYLAND: I agree. We have said that we would do everything necessary to make it go quickly. We will keep our witnesses down. And if I can't convince you, your Honor, if this is where you are going to go and this is the reason, then I would ask that whatever ruling you make be limited to the burden because, as you suggested, there are other ways to get this evidence in so it would be a mistake, I think, to rule broadly that we can't put any of this evidence in through some other means. It might be appropriate to say you can't burden the government to get it but I think, clearly, that goes to burden, not relevance.

MS. GOLDMAN: Your Honor, if I may? I think Mr. Wayland's --

THE COURT: You already won, Ms. Goldman. Mr. Wayland has said that I should restrict my ruling.

MR. WAYLAND: If you are inclined to rule against us, your Honor.

THE COURT: I am. I am because I have had experience -- in this case and in other cases -- and it is grossly unfair to the progress of these cases to everything else I have to do as a Judge in this court and to these plaintiffs to get involved in these kinds of proceedings unless I have no recourse. And there is recourse. At least there is at this moment.

I don't have to rule on relevance. That can wait

another day. But, given the issues as they are presented to me the burden, the confusion, the expense, and I won't go into other considerations because these are enough, all dictate that I should not allow this discovery.

Thank you very much, Ms. Goldman. You were eloquent.

MR. MIGLIORI: Can I thank her?

THE COURT: I'm not going to write on this issue unless somebody feels they need to. I think I am better off.

Okay, nobody is asking to write. Let's go back to number 1. We left Boeing's excellent argument made by Ms. Gaston up for tantalizing review and Mr. Williamson is going to respond.

Richard William son is speaking for -- who is your client in this one, Mr. Williamson?

MR. WILLIAMSON: World Trade Center Property cross-claimants, your Honor; good afternoon.

Good afternoon, your Honor. I was going to start, if I may, with the arguments of Mr. Wood to go in, because they go together with the arguments of Boeing. So, I will deal with the airport operator argument and then Boeing, if I may.

THE COURT: That's fine.

(Continued on next page)

MR. WILLIAMSON: Essentially what each of these is doing is saying we are a specific type of defendant, so for us, we want to have a different duty of care and we want to have the court find that there could be no liability to us in these circumstances.

THE COURT: I don't think they are saying that. I think they are saying that the building was occupied. I don't want to do it on different arguments. So let's focus on either one, but don't mix them because they are different.

MR. WILLIAMSON: OK. With respect to Massport, page 1 of their opening brief, the moving brief is very revealing. It tells us in the third full paragraph that they are arguing that under the regulations, the airport, I quote, the airport operators had no duty to oversee, implement, supervise, or other otherwise conduct passenger screening in any way, close quote. That's really the guts of their argument.

THE COURT: I think what Mr. Wood taught me is that their job was to allocate responsibilities among various entities. Once they did that, unless they were negligent in their choice, their responsibility ends.

Have I captured your argument.

MR. WOOD: If the FAA allocates responsibilities, then we are to carry out ours and the airlines are to carry out theirs.

THE COURT: I never heard from you what were your

responsibilities.

MR. WOOD: Our responsibilities under Part 107, your Honor, are to put a fence around that airport, to control access to that airport, to investigate and give badges to people that want access to that airport, to provide a police department at that airport, so that if we are summoned by the airlines to deal with somebody at the airport, we have a policeman that comes in. In general, it's access and providing a police department at that airport that Dulles, Newark, and Massport are obligated to do under the federal statutes and regulations.

THE COURT: But not screening.

MR. WOOD: But not screening. Specifically 44901, Congress specifically assigns that jobs to the air carriers or their agents.

THE COURT: OK.

MR. WILLIAMSON: I think actually a number of arguments were really made. One is that under the law they can't be liable, then we will examine in a second if I may whether Massport's abilities and duties are as limited as you just heard and as stated in their brief whereas I say they had no duty. Let's take a look at that together. First, it's contrary to the law. The second Circuit has told us in *Japan Airlines* in 1999 that such an argument is rejected when it was made by a different airport operator.

In that particular case, it was the Port Authority. The Port Authority's main argument, in the words of the Second Circuit, and I quote at page 109, is that a finding of negligence cannot be predicated upon its failure to clear beyond the edges of the runway because it had no duty to do so. We disagree. The Port Authority's status as an airport operator requires it to maintain JFK in a reasonably safe manner for the benefit of passengers and carriers using the airport, close quote.

It goes on to analyze that the Port Authority's argument was predicated upon the fact that there were regulations in place, it said we complied with them, we did the minimum therefore we cannot possibly be liable. The Second Circuit rejected that argument, as I said, and said that the airport operator had a duty to maintain the airport in a reasonably safe manner.

To continue, the proposition being advanced today is rejected by the Second Circuit; it's contrary to Second Circuit law.

THE COURT: What section.

MR. WOOD: 44901.

MR. WILLIAMSON: May I go on, your Honor.

THE COURT: One minute.

(Pause)

THE COURT: Section 44901(a) imposes on the

administrator of the Federal Aviation Administration the obligation to describe the regulations that require screening. It goes on to say, the screening must take place before boarding and be carried out by a weapon-detecting facility or procedure used or operated by an employee or agent of the air carrier, intrastate air carrier, or foreign air carrier. It doesn't say anything about the airport facility itself. What should I take from that statement.

MR. WILLIAMSON: You are being asked to look at the wrong section. Let's look at the right section together. If we look at 601(b) of the Federal Aviation Act, which is discussed and explicated in the Federal Aviation Handbook, Exhibit 8 to our declaration, establishes, quote, Section 601(b) of the FA Act specifies, and it goes on to say that the FAA --

THE COURT: Let me get it.

(Pause)

THE COURT: Entitled safety regulation of civil aeronautics.

MR. WILLIAMSON: Yes.

THE COURT: It's describing standard rules and regulations and issuing certificates, is that how it starts.

MR. WILLIAMSON: Section 601(b) of FA Act specifies in part when describing, yes, I think we are in the same place.

THE COURT: OK.

MR. WILLIAMSON: Here is what's important and what debunks the propositions Mr. Wood was advancing. I was picking up, your Honor, with the quote that FAA shall give full consideration to the duty resting upon air operators, that's Massport, to perform their services with the highest possible degree of safety in the public interest. It continues and says --

THE COURT: My text says the administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest.

MR. WILLIAMSON: I am referencing Section 8300, your Honor; it's 6-5 at the bottom.

THE COURT: Tell me what this larger text is from.

MR. WILLIAMSON: This is the FAA handbook that I was drawing your attention to.

THE COURT: What is the FAA handbook; is it a regulation.

MR. WILLIAMSON: It's promulgated by the FAA.

I don't know if I understand the question.

THE COURT: What's the force of law; is it a regulation codified in the Code of Federal Regulations.

MR. WILLIAMSON: No, I think similar to the answer Mr. Joseph gave you, I think it has persuasive authority, and it explicates --

THE COURT: It's an informational bulletin.

MR. WILLIAMSON: It's more than that; it's what they are operating under. We can brief that separate point. I just wanted to draw your attention to its statement as to what the FA Act is doing and what are the duties of airport operators, which is what we are discussing. This is consistent completely with the Second Circuit's decision that I just referenced in *Japan Airlines*, which is discussed in our brief. There is other law on point as well.

THE COURT: This does talk about air operator, and you are saying that Port Authority and Dulles and Massport are air operators.

MR. WILLIAMSON: Right. It says here the FA Act, again that's in the text, what I was about to go to.

THE COURT: This reference to 601(b) and the statute itself refers to air carriers.

MR. WILLIAMSON: But it indicates here that the FAA shall give full consideration to the duty resting upon the air operators. That was the point I was trying to make.

THE COURT: I understand.

MR. WILLIAMSON: So may I continue.

THE COURT: Please.

MR. WILLIAMSON: It goes on to say the FA Act recognizes that holders of air operator certificates have a direct responsibility for providing air transportation with the

highest possible degree of safety. The meaning of Section 601(b) of the FA Act should be clearly understood. It means that this responsibility rests directly with the air operator, irrespective of any action taken or not taken by an individual FAA inspector or the FAA.

So the effort, by the argument presented today, and at page 1 of the brief, to say we have no duty then at page 3 of the opening brief to say we have a duty, the standard of care should be limited to doing the minimum under federal regulations and then we are off the hook, that is debunked, as I say, by the Second Circuit decision in *Japan Airlines*. The FAA handbook tells us that's not right. Air operators are governed by that. Let me continue.

We also have *DiBenedetto*, Second Circuit 2004. In *DiBenedetto*, in a situation where it was dealing with airport security on the ground, OK, is examining what can be the possible liability of the parties involved in the airport security. It concludes, this is at page 630, your Honor, they have to taken reasonably appropriate steps to avoid or minimize the likely harm. I was quoting from the Second Circuit. It's not we are off the hook because we did what we say the regulations provide and that minimum is good enough.

Let me continue. Mr. Wood advanced an argument --

THE COURT: Do you have the cites of *Japan Airlines* and *DiBenedetto*.

MR. WILLIAMSON: Absolutely. *Japan Airlines* is 178 F.3d at 103, and the quotation I read to your Honor was at 109. And should I give you the *DiBenedetto* as well.

THE COURT: I have it. Go on.

MR. WILLIAMSON: So the motion advanced earlier this morning that the airport operators cannot exceed regulations, can't even use common sense is contrary to the law in this circuit. Also you were told I believe that Massport did not know why it's being sued and couldn't really make it out from the pleadings. As you recall, when we were together in 2003, Massport made a 12(b) motion, arguing that the complaint against should be dismissed. That was denied without prejudice.

The proposition that Massport doesn't know why it's being sued I submit is not supportable even under the barest standards of notice pleading. If we look together at Exhibit 3 to our declaration, you have chapter and verse for why Massport is being sued. Exhibit 3, your Honor. There are three counts directed to Massport as well as other defendants, the first one being for negligence at page 10.

THE COURT: In what respect.

MR. WILLIAMSON: Then we have paragraphs 41 to 53.

THE COURT: In what respect.

MR. WILLIAMSON: To begin, in paragraph 42, for example, the fifth line down from the top, it's alleged that

the defendants, this group including Massport, undertook and did develop implement, own, operate, manage, supervise, staff, equip, maintain, control and/or --

THE COURT: Would it be fair to say that these regulations are extremely general to satisfactory the rules of pleading but they don't really give any specific knowledge to the defendant.

MR. WILLIAMSON: I think --

THE COURT: I am not saying you have to; I am saying they don't.

MR. WILLIAMSON: This was only my first one; I have many more paragraphs to go.

THE COURT: Go to the last one. It doesn't really make a difference. What's the next point.

MR. WILLIAMSON: To the extent that, I think your Honor asked this question as well, should you be moving for summary judgment, if that's what Massport thinks it should be doing, we stand prepared to --

THE COURT: I am sure.

MR. WILLIAMSON: -- submit evidence which suggests that what was represented was to the contrary.

THE COURT: Let me ask you, what is it you want me to do at the end of today.

MR. WOOD: Your Honor, I want to read it into the record, because over the lunch hour over my salad I thought I

should have answered that better this morning.

This is what I want you to do.

I request that you rule today that the standard of care for Dulles, for Newark and Logan Airports security duties is defined by the security duties specifically assigned to those airports under federal law, specifically 44 U.S.C. 44903, which tells the administrator what to do, 14 C.F.R. Part 107, which tells the airports what to do from the FAA, and the Airport Security Plan approved by FAA, which tells us in detail what to do.

If you would rule that today going forward on divorce against these airports which was supposed to be limited four years ago, experts employed by these airports, summary judgments framed up by these airports are all going to be a whole lot more efficient for this case and for this court, because those laws preempt and completely fill the field of what we are supposed to do.

The *Japan Airlines* case is a perfect example. We are supposed to take care of the runways, and the *Japan Airlines* case was all about whether or not the snow and ice had been properly removed from the runway. It had nothing to do with screening.

THE COURT: I don't want to cut short Mr. Williamson.

MR. WOOD: Excuse me; I get a little wound up sometimes.

MR. WILLIAMSON: Thank you, your Honor.

With respect to the motion --

THE COURT: You couldn't have had much time to enjoy your salad.

MR. WOOD: You are more than important the salad.

THE COURT: I said that to my wife.

MR. WILLIAMSON: With respect to the motion that any regulations that existed were ones that Massport satisfied and they couldn't have done anything else, that is refuted in numerous respects.

THE COURT: Do you sue Massport for derivative liability because you argue those who operated the checkpoints were negligent, their companies were negligent, and therefore Massport was negligent.

MR. WILLIAMSON: Not only. I was about to say Massport's involvement here is much greater than is being portrayed. Let me be specific. Massport had the power over areas of security and had recognized authority and responsibilities for the checkpoints. It chose not to exercise direct control over the checkpoints.

THE COURT: What do you mean they had control.

MR. WILLIAMSON: Massport's own airport, this is what has emerged in discovery, there is no summary judgment motion here so it's not being put forward, but since it was raised today, Massport's airport security program provides, and I

quote, the FAA or Logan Airport and affected airlines will determine when increased security measures are necessary.

THE COURT: That's enough.

MR. WILLIAMSON: So on.

THE COURT: That's enough.

MR. WILLIAMSON: I have more and more and more like that.

THE COURT: I am not going to give you an abstract ruling. If you want me to take specific action like dismiss the case, I will consider it, but I am not going to give it, just the way I declined to do it earlier. These are in effect motions in limine that will determine in large part how I might rule if a specific issue were presented by way of a piece of evidence or an instruction to a jury or a disposition of the case. I decline to do that.

MR. WOOD: Your Honor, I understand that. I wouldn't stand here, because I understand the difference between summary judgment and 12(b)(6) motions, I wouldn't stand here and ask you to do that, because that's a question of how do we comply with the law. What we are asking today because of these very specific federal statutes and regulations is for you to simply rule this is the law that applies to these airports.

THE COURT: I am not going to do that. I learned that my power of definition is limited. I am not a legislator, I am a judge, and I have to make rulings when I am compelled to do

so to decide a case. This is not a decision of anything in the case, so I am not going to do it.

MR. WOOD: If I tried to frame it as this is the law that applies to the very defined issue of security duties, would I get any further down the road.

THE COURT: No. I don't supply a rule of decision except with respect to a judicial action, and I am not asked to do a judicial action.

Thank you very much, Mr. Williamson.

Let's go to Boeing.

MR. WILLIAMSON: Yes, your Honor. With respect to Boeing, a number of interesting statements were made when Ms. Gaston presented the argument. One of the more interesting questions that your Honor posed was why didn't you move for summary judgment, because that's really what this Boeing memo of law is, we submit, and the answer is they did.

What happened is we served targeted discovery requests, I have a copy with me, on Boeing seeking further information, specifically among other items, to their airport, their air carrier security system, including without limitation the cockpit doors, because the way the argument was presented to you, it was purportedly with claims being limited to the cockpit doors, although near the end Ms. Gaston did concede that there are claims, indeed there certainly are in our cross-claims, beyond just the cockpit doors.

We asked for discovery and document production with respect to items going back to January 1, 1970, because you hear today that in 1970, they decided that they shouldn't change the way cockpit doors are made to be less intrusive. So we are supposed believe that in the last 30 years --

THE COURT: She said something different; she said the government instructed. She is talking about government regulations.

MR. WILLIAMSON: So within the last 30 years, we are to believe nobody has thought about it again. I submit that that's why we asked these questions numbers 66 to 78.

THE COURT: She said, Mr. Williamson, she said that the government proposed rule making as to the desirability of an intrusion-proof cockpit door, found on the basis of comments from the public and its own investigations that it was not desirable to have an intrusive-proof cockpit door and withdrew the regulations, which means that the government made a decision that as between having intrusion-proof cockpit doors and not having intrusion-proof cockpit doors, it was better in all the circumstances not to have intrusion-proof cockpit doors.

Boeing says, not in a motion for summary judgment because they are scared to make a motion, they think I will do something very nasty, which I won't, they say that, therefore, in compliance with a federal decision, they decided not to have

intrusion-proof cockpit doors. And since, as I have been given to understand since I made my first decision in this case on the issue of duty, the issue was intrusive-proof or not intrusive-proof, I can understand their position that they should not have an intrusion-proof cockpit door. Maybe the government was wrong, but the government instructed them. That's what they say.

MR. WILLIAMSON: That's what they say, your Honor. Interesting. I was going to give you the chronology. We asked for information on a category called interactions with governmental agencies. This is our discovery request served April 12. You asked why didn't they move motion for summary judgment. They actually did. They did move motion for summary judgment after they got our discovery requests targeted to, among other things, their interactions with the governmental agencies, one of which seeks to find out how come nobody has woken up in 30 years, if you believe Boeing's story.

THE COURT: When was your interrogatory propounded.

MR. WILLIAMSON: April 12.

THE COURT: Why has it not been answered.

MR. WILLIAMSON: Because, interesting, tactics are everything sometimes, the first thing they did was ask for more time to produce documents or otherwise respond.

THE COURT: Which we gave.

MR. WILLIAMSON: Absolutely.

THE COURT: What's the enlarged date.

MR. WILLIAMSON: It is supposed to be today.

THE COURT: Maybe in your office you have them.

MR. WILLIAMSON: No, because we were told that they were mailed to us, but maybe they will arrive. Undoubtedly they will; something will arrive.

THE COURT: If you were told they were mailed, I am sure they were mailed.

MR. WILLIAMSON: I am sure they were mailed too. It would have been nicer, obviously my point is, to have gotten them faster.

THE COURT: Maybe I should hear this again after you receive them.

MR. WILLIAMSON: That's exactly right, because we should see what they have to say.

MS. GASTON: No, your Honor, it's an issue of law, not of fact.

THE COURT: No, no. Suppose the government told you that's what we thought about it in 1973, but we have had a change of mind, it's up to you, Boeing, you decide what to do.

MS. GASTON: I would argue again that the issue of preemption makes that issue irrelevant. First of all --

THE COURT: It's not an issue of preemption. The government told you, it's up to you.

MS. GASTON: Then it would be in the federal

regulations.

THE COURT: Not necessarily. On the record, all we have is the government withdrew the proposed ruling; that's what we have. It's like *certiorari* denied; there is no precedent, except if there is nothing further, you have a very strong argument, but there is no precedent. If the government told you something different, in the interval or some circumstance changed in the interval, there may be a case. I don't know.

I am not going to make abstract rulings. It should be clear to everybody that I don't have enough confidence in my ability to do that.

MS. GASTON: Your Honor, respectfully, it requires facts and it requires discovery in order to make conflict preemption decisions. It does not require the governmental facts in order to make a field preemption decision.

THE COURT: I don't want to do that. How many areas of law do we have to deal with preemption.

MS. GASTON: I can't answer that.

THE COURT: Beyond labor law, is there anything else.

MS. GASTON: I don't know.

THE COURT: Labor law and ERISA, what else.

MS. GASTON: What other field is regulated to the extent that aircraft design is, your Honor.

THE COURT: I don't know.

MR. WOOD: Tanker design, you bet.

MS. GASTON: Maritime tankers.

THE COURT: Federal maritime law. I don't know. I am not a jurisdictional scholar, I am not a jurisprudential scholar, I am an Article III judge, which means I can back switch hands. I am not making any rulings.

Mr. Williamson, thank you very much.

MR. WILLIAMSON: Thank you, your Honor.

THE COURT: I not writing on any of the issues so far. It be has been a long day; I don't have anything to take back so far. The next issue is punitive damages. Mr. Podesta.

MR. PODESTA: Your Honor, Roger Podesta for American Airlines, with respect to the motion as to the punitive damages claim in flights 11, 77 and 175. Let me get directly to the concrete, your Honor. There appear to be certain aspects of this motion that are unopposed. American and Ardenbrite have moved for a dismissal of the Teague and Whittington flight 77 punitive damages claims because those are Warsaw Convention cases, and the Second Circuit has held that punitive damages are not recoverable against air carriers and their agents under the Warsaw Convention. The Teague and Whittington plaintiffs have not opposed this motion, so those claims should be dismissed period. We are not requesting any abstract ruling; we are requesting a dismissal of the punitive damages claim.

Secondly, it appears --

THE COURT: Stop for a minute.

Any opposition to that.

MR. MIGLIORE: That issue came up earlier with Mr. Moller this morning. There is a briefing schedule on other issues relating to those claims. They were not raised specifically for purposes of this motion. We ask that they just be carried over to the briefing, because there is a summary judgment motion pending on those cases on the issue of the convention.

THE COURT: We were supposed to do punitive damages today.

MR. MIGLIORE: Your Honor, I wasn't responsible. I am asking the people who are briefing that issue. To my knowledge it wasn't briefed in this particular motion.

MR. PODESTA: Yes, it was, and the proposed order specifically called for the dismissal of the Teague and Whittington punitive claims.

MR. MIGLIORE: Candidly, your Honor, this wasn't something that I was doing; I was here on the government brief.

THE COURT: I will hear it on a rehearing if I give it.

MR. MIGLIORE: It may well be given what it is, we can agree to it as well. If you don't mind, let's defer it.

THE COURT: I am going to rule. I am going to dismiss those cases. If you want to bring a motion for a rehearing, I

will hear it.

MR. MIGLIORE: You are going to dismiss that claim of damages.

THE COURT: That claim of damages against Teague and Whittington. OK, Mr. Podesta, doing great so far.

MR. PODESTA: I am on a roll. When I have a Second Circuit decision directly on point and no opposition, I can win them.

MR. MIGLIORE: Without prejudice.

MR. PODESTA: OK. I will move into more dangerous ground. I believe that the motion to dismiss the punitive damages claims is also unopposed as to the property damages. The World Trade Center plaintiffs in their brief supporting their cross-motion on severance and deferral expressly take no position on the outcome of the punitive damages motions between the aviation defendants and the other plaintiffs.

THE COURT: Mr. Williamson.

MR. WILLIAMSON: That is correct, your Honor.

THE COURT: OK. Dismissed.

MR. PODESTA: I win that one too.

MR. JOSEPH: We didn't make the punitive damages claim, so it can't be dismissed.

THE COURT: OK.

MR. PODESTA: I am on a roll. The whole group of plaintiffs in their opposition in Section 2(b), which was the

only opposition on flights 11 and 175, which are the only cases with property damages claims, only argue that they could pursue their punitive damages claims with respect to personal injury and wrongful death claims.

THE COURT: There are no punitive damages claims left in Teague and Whittington in any and all property damages claims.

MR. PODESTA: I believe that's correct. Building on this momentum, I will now move to oppose. Look at the progression here. I had no opposition and a Second Circuit decision, then just no opposition. I am now graduating to the point where I can deal with opposed motions.

THE COURT: Anything further you would become a retired partner or a judge.

MR. PODESTA: The aviation defendants' motions as to flights 11 and 175 rest on three basic premises, two of which are undisputed by plaintiffs. Remember, these are the flights that left Logan for New York. First, Section 408(a)(1) of the ATSSSA or the Stabilization Act restricts recovery of all kinds of damages in the 9/11 litigation to the limits of the aviation defendants' liability insurance coverage. Thus, as plaintiffs concede, there can be no direct financial recovery in these cases from the aviation defendants. The only potential source of recovery is from the liability insurance policies. So far, I think we are in agreement.

The second problem is the only one that I believe the plaintiffs dispute. That is, the aviation defendants contend that under Section 408(b)(2) of ERISA, which we discussed at length this morning, punitive damages issues are covered by New York law.

THE COURT: Not ERISA, I think you said ERISA.

MR. PODESTA: ATSSSA.

Third, as plaintiffs again concede, New York has a strong public policy prohibiting insurance coverage for punitive damages. That has been reaffirmed six times in the last 30 years by the New York Court of Appeals.

Thus, a combination of these three premises --

THE COURT: What was the second one.

MR. PODESTA: That New York law applies.

THE COURT: Because the flights ended up in New York.

MR. PODESTA: Because the flights ended up here, and under New York's choice of law rules, New York would apply its own conduct regulating rules to the issue of punitive damages and would apply its own public policy, both as to forum and under the operation of its choice of law rules.

Thus, if New York law applies to the flight 11 and 175 cases, plaintiffs are prohibited from recovering punitive damages, not only from the aviation defendants by virtue of ATSSSA, there can be no directed injury recovery, but also by virtue of New York law, they cannot recover punitive damages

from the liability insurance policies, because New York law prohibits insurance coverage for punitive damages.

This makes sense as a matter of New York law. Punitive damages are not, according to the New York Court of Appeals, designed to serve a compensatory function. They are designed solely to deter and punish the wrongdoer by imposing financial loss on that wrongdoer. Because ATSSSA makes that impossible here, there can be no financial loss to the aviation defendants. Punitive damages serve no conceivable purpose under New York law and should be dismissed.

Plaintiffs make three principal points in opposition. The first of these is that Congress somehow endorsed the recoverability of punitive damages in all 9/11 cases, regardless what state law may say, because it mentioned, it used the words punitive damages in section 408(a)(1) of ATSSSA, the Stabilization Act.

THE COURT: Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity arising from the terrorist-related aircraft crashes on September 11, 2001, against an air carrier, aircraft manufacturer, airport sponsor, or person with a property interest in the World Trade Center on September 11, 2001, I will skip some words, shall not be in an amount greater than the limits of liability insurance coverage maintained by that air carrier, aircraft manufacturer, airport

sponsor or person with a property interest.

MR. PODESTA: As that language as you just read shows, your Honor, Section 408(a)(1) does not create a cause of action for punitive damages or anything else. It operates solely as a limitation on the liability of the aviation defendants to the limits of their liability insurance coverage. That section of the statute mentions punitive damages only to make clear that all types of damages, whether for compensatory damages or whether for punitive damages or whether for contribution or whether for indemnity are subject to the liability cap.

The federal cause of action for damages --

THE COURT: But the payor is not the insurance company directly; it's the aircraft company.

MR. PODESTA: Well, they are the defendant.

THE COURT: The money comes from insurance and they can't pay out more than insurance, but it doesn't directly say either that the insurance company is the paying agent directly or that they can't pay whatever damages are assessed, compensatory or punitive or otherwise.

MR. PODESTA: 408(a)(1) does not say whether punitive damages can be recovered period. It's totally neutral on the subject.

THE COURT: It may be inconsistent with the scheme set up by Congress but it's not I think a direct consequence of the wording of the statute.

MR. PODESTA: No. 408(a)(1) just says whatever kind of damages you have, punitive or compensatory, are limited to your insurance coverage. To reach my conclusion and to dismiss their claims, you have to move beyond 408(a)(1) to New York law. It's the interaction of 408(a)(1) with New York law chosen under 408.

THE COURT: Why give up that argument. Why give up the motion that the statute intended to allow recovery only to the extent of the defendants' insurance coverage. It might be inconsistent with giving windfall awards to particular people as a means of punishing a defendant. There was no way to know when statute was created that the insurance coverage would be sufficient to pay all claims. It was only because of the extraordinary work of the special master and the creation of victim compensation fund in the same statute that that particular problem seems to be academic. It may not be academic.

There are considerable property claims. There are considerable claims that come against the city with regard to other aspects of the case. No one knows how this will all work out in the end. It may be that there would not have been enough money to pay all compensatory claims if there had not been these other features. So one could argue that it is inconsistent with the statutory scheme of limiting liability to insurance to allow any particular plaintiff to recover the

windfall of punitive damages

MR. PODESTA: I think that's certainly an argument.

THE COURT: It's a good argument.

MR. PODESTA: Yes, it's a very good argument.

THE COURT: Why don't you make this.

MR. PODESTA: Because it really goes more towards the question of deferral and severance than it does to outright dismissal.

THE COURT: I am not a bankruptcy judge. I am not going to wait until all claims I have allowed, all these settled claims to be paid out and paid out promptly. We can't wait. Look what a destructive scheme it would be to wait. People in need of money would have to wait. People who lost their wage earner would have to wait. It is inconceivable that it would be Congress' plan. It's a pay-as-you-go basis, and it seems to me that the scheme is inconsistent with giving up punitive damages.

MR. PODESTA: Then I make that argument, your Honor. You persuaded me. I don't know whether you succeeded in persuading Mr. Moller as yet, I endorse that argument. I would like to go on to the argument that I did make. I am doing great here; I am not only winning unopposed motions but I have judges giving me arguments saying why don't you make those arguments. What more can I ask for; this is paradise.

But in any event, assuming I win on that, the federal

cause of action for damages is created by 408(b) and 408(b)(2) directs this court to look to the law of the state of the crash, including its choice of law rules, to determine whether punitive damages are available. In other words, Section 408(a)(1) does not authorize punitives. If any punitives are authorized under the statute --

THE COURT: It's certainly not inconsistent with federal law that New York law forbidding punitive damages in this situation if paid by the insurance company would be the choice of law. Does New York law on the cases that have arisen under New York law speak to a situation where a defendant is being asked to pay punitive damages because insurance would pay punitive damages and not apply.

MR. PODESTA: The New York Court of Appeal has held in six occasions in the last 30 years that defendants may not look to insurance coverage to pay punitive damages and they have so held even in situations where the contract expressly provided that punitive damages were covered under the policy. There is absolutely no inconsistency between New York public policy against insurance coverage for punitive damages and anything in ATSSSA.

THE COURT: So now we can cover flight 11.

MR. PODESTA: And 175.

I have to cover the choice of law issue.

THE COURT: That leaves the Virginia flight and the

Pennsylvania flight.

MR. PODESTA: I still have to establish that New York law applies to flights 11 and 175 because that is disputed.

THE COURT: The crash was in New York.

MR. PODESTA: Yes, but the plaintiffs say that Massachusetts law should control.

THE COURT: Why.

MR. PODESTA: Because under New York law rules, you look to whether it's a conduct-regulating rule, and it's agreed punitive damages are conduct-regulating rules, you look to the law of the place of the tort. Where two jurisdictions may claim to be the place of the tort --

THE COURT: The State of Massachusetts was the conduct-regulating state because it passed through Logan.

MR. PODESTA: The preboarding screening occurred there.

THE COURT: That's why you want me to rule that federal law applies.

MR. PODESTA: I want you to rule that New York law controls as to the availability of punitives under, as flights 11 and 175, and 408(a)(1) also applies.

THE COURT: If the conduct was in Massachusetts and the crash occurred in New York, wouldn't New York's conflict of laws point to Massachusetts.

MR. PODESTA: No. New York's conflict of laws would

point to New York because New York says where two jurisdictions may claim to have an interest in applying their own conduct-regulating rules, New York applies as a tie-breaker where the last event necessary to make defendants liable occurred. That tie-breaker, I think even plaintiffs would concede, operates here in favor of New York.

THE COURT: Why.

MR. PODESTA: Because the last event necessary to make the defendants liable on the personal injury cases and the ground wonderful death cases was the crash of the planes into the World Trade Center. Until that point there had been no breach of duty, there had been no injury to those plaintiffs.

With respect to the wrongful death passenger planes --

THE COURT: What was the conduct-regulating activity in New York.

MR. PODESTA: The place of the issue is whether they are the place of the tort and the place of the tort typically is where the last injury occurs. There is no tort until there is injury, so that's what makes New York the place of the tort.

THE COURT: But the conduct regulating removes that from the place of injury and goes back to where the conduct was. The negligence, if there was negligence, was in the airport screening that took place in Massachusetts.

MR. PODESTA: It's also alleged to have occurred onboard the flight in the way the hijacking was handled.

That's the cockpit door argument and common strategy argument.

THE COURT: The conduct with the cockpit door had to do with Seattle, Washington.

MR. PODESTA: Not as to the airlines, it didn't.

THE COURT: What was the negligence of the cockpit doors.

MR. PODESTA: That we didn't have a reinforced cockpit door and that we did not take appropriate measures to secure even an unreinforced cockpit door. But in any event, New York, I mean the reason New York law applies is --

THE COURT: Go on to Virginia.

MR. PODESTA: I need to go on to Massachusetts. It doesn't really matter, it's academic, because Massachusetts is one of the few states in the country that does not recognize punitive damages at common law. If the personal injury claims, if they were governed by Massachusetts, they have to be --

THE COURT: You have New York law and Massachusetts law.

MR. PODESTA: No conflict. The same is true as to wrongful death cases, because while Massachusetts authorizes punitives in wrongful deaths by statute, it applies the same approach as New York. There is no Massachusetts case that has allowed for insurance coverage for punitives. Massachusetts rarely considers these issues.

THE COURT: Let's go on to Virginia.

MR. PODESTA: OK. There is no truth conflict between New York and Massachusetts. Either way --

THE COURT: You are finished with Massachusetts.

MR. PODESTA: The Virginia issue is very simple really. Virginia does allow for punitives.

THE COURT: Time out before you get to Virginia.

I am Part I judge this week; I have to sign some papers.

(Pause)

MR. PODESTA: Virginia is relatively simple. Virginia does permit insurance for punitive damages, but it has a $350,000 statutory cap that applies, and our interpretation of the statute has not been contested.

THE COURT: In the aggregate or per claim.

MR. PODESTA: It applies to all defendants in the action as a single limit; in other words, the total amount that any --

THE COURT: How about all plaintiffs.

MR. PODESTA: That's not clear. We have asked for purposes of this, one district court in Virginia has so suggested, but I think that it's entirely possible that the proper interpretation of the statute is that each decedent and each injured plaintiff, not beneficiary or consortium people, but each physically injured plaintiff and each wrongful death plaintiff could recover $350,000 from all defendants who happen

to be at trial in the action.

THE COURT: Pennsylvania.

MR. PODESTA: As to that, I have to respond to plaintiffs' argument. Plaintiffs say that cap can't apply because it's inconsistent with ATSSSA. They say it's inconsistent with 408(a)(1), and that's just repeating the same mistake.

THE COURT: Pennsylvania.

MR. PODESTA: Pennsylvania, I have to defer to Mr. Ellis.

(Continued on next page)

THE COURT: Mr. Ellis.

Mr. Ellis, stay where you are.

MR. ELLIS: I will make it quick, Judge. First of all, I adopt your argument.

Second of all, I would like to say Pennsylvania is relatively easy. Really, there is no conflict. The only laws that could apply would either be Pennsylvania, New Jersey, or Illinois where plaintiffs claim there was corporate policy issues that make us liable. Again, they haven't specified which ones.

But, the bottom line is --

THE COURT: Pennsylvania claim came from Newark, right?

MR. ELLIS: Yes, your Honor. The flight took off from Newark. Plaintiffs, in their choice of law argument explain --

THE COURT: So, it is New Jersey or Pennsylvania.

MR. ELLIS: It is New Jersey, Pennsylvania or Illinois. And basically they came out in first place.

United, as a result of their bankruptcy, any recovery can only be from their insurance policy. Plaintiffs don't dispute that. The only thing the plaintiffs claim is that the law of Pennsylvania should apply. We will get into that in their compensatory damage motion. But, for purposes of punitives, as we point out in our reply brief, Pennsylvania law does not allow the recovery of punitive damages if there is a

finding of direct liability even if there was a finding also of vicarious liability.

The point of the matter is New York, New Jersey -- I mean Pennsylvania, New Jersey, Illinois, all do not allow these damages to be insured.

THE COURT: Give me Pennsylvania again. What is the law?

MR. ELLIS: The law in Pennsylvania is simply that if you are only vicariously liable -- only vicariously liable.

THE COURT: Why is the aircraft vicariously liable?

MR. ELLIS: Again, Judge, I have no idea. They haven't told us but this is what they claim, they claim we can show.

THE COURT: They claim United's people allowed the people on the plane.

MR. ELLIS: As a matter of fact, they briefed claims specifically that we were both direct and vicariously liable. So, they're out as a matter of law.

THE COURT: So, we have to assume that there is a direct liability not a vicariously liability.

MR. ELLIS: And there is no recovery -- I can't insure that under Pennsylvania law.

THE COURT: Same as New York?

MR. ELLIS: Same as New York.

THE COURT: Can't recover insurance money.

MR. ELLIS: There is little nuances but under these circumstances, same result.

THE COURT: And New Jersey?

MR. ELLIS: Same thing.

And Illinois doesn't allow recovery of punitives, period.

THE COURT: I don't understand why Illinois is involved.

MR. ELLIS: Because plaintiffs allege that there was corporate policy decisions. United is headquartered in Illinois. Again, it remains to be seen what they're going to claim but it is cited because of the breadth of the their claims.

Thank you, your Honor.

THE COURT: Okay.

Mr. Shultz.

MR. SHULTZ: Would you also prefer that I stay here as opposed to the podium? I will keep my remarks brief, your Honor.

First, Boeing also adopts the positions set forth and agreed to by Mr. Podesta and Mr. Ellis, that any award --

THE COURT: Just go to Washington. Where was the plane made?

MR. SHULTZ: Designed in Washington, manufactured in Washington, and all four planes were delivered to American and

United Airlines in the state of Washington. We believe Washington covers Boeing's conduct including punitive damage claims.

THE COURT: What is the rule of Washington?

MR. SHULTZ: Washington does not allow punitive damage claims in this case.

THE COURT: Mr. Moller?

MR. MOLLER: Your Honor, I would like to step back for a moment from jumping to the conclusions that my colleagues on the other side have been doing.

Having now heard from the defendants in their arguments to the Court and having read their briefs, they persist, I believe mistakenly, in conflating the issues of recoverability of punitive damages with the issue of collectibility of punitive damages.

The states in which these planes crashed all allow recovery for punitive damages either in a wrongful death case or in a survival action. The defendants also carefully avoid acknowledging the glaring inconsistency between the state policies which do not permit the insurability of punitive damages claims and impose that burden upon tort feasor with the unprecedented federal legislation which Congress enacted to deal with the 9/11 disasters, the Air Transportation Act that we have been talking about. This legislation makes the question of who should pay punitive damages a matter of federal

policy and not state policy.

The Act reflects a careful balance between three competing interests -- first, the perceived desire of Congress to be responsive to the avation industry's cry for protection and assistance in the wake of 9/11 caused in part by the avation defendants' concern that they might be held liable for very substantial punitive damages as well as compensatory damages, a prospect that was deemed real and still is in the shadow of the horrific events of 9/11.

Second, Congress was concerned about the humanitarian impulse of the nation to create a vehicle outside of the litigation process for those people who elected to take advantage of the Victims' Compensation Fund to receive compensation without litigation. And those people had to give up the right to recover punitive damages if they entered the system.

THE COURT: It wasn't worded that way. You have the right to sue under normal tort law.

MR. MOLLER: And by virtue of giving up the right to sue they would give up right to seek punitive damages.

And, thirdly, Congress preserved all the rights and remedies of parties who sustained losses through wrongful death or personal injury who elected to pursue the litigation process, as I just said.

The balance Congress struck to address these competing

interests was, of course, the victims' compensation fund; second, statutory protection for the aviation defendants by providing that their treasuries could not be reached to satisfy judgments for compensatory or punitive damages, and of course preserving the victims' rights to pursue claims for compensatory and punitive damages which each state in which the crashes occurred allowed.

And here is the tradeoff: We all know that for the victims who elected not seek compensation they can only get money from the insurance policies which cover the various defendants up to the limits of coverage.

The New York policy precluding insurance coverage for punitive damages was not one which was made in the context of 9/11 and the New York State courts dealing with the issue were balancing different interests.

Congress could not, and there is no evidence to suggest that it ever intended, a purchase to be permitted to seek punitive damages and then not collect those damages.

To deny plaintiffs the ability to collect a punitive damage award which Congress specifically allowed would mean that the plaintiff would lose rights. And the loss of rights cannot be presumed or inferred.

Therefore the answer, I believe, to the question you posed earlier to counsel, is that it is the statute itself which stands for the proposition that punitive damages are

collectible from the insurance policies here because there is no statement in the legislation to preclude it.

Now, what I would like to do is walk through the ATSSA statute to make the point of how often Congress addressed punitive damages and, by doing so, they had to be aware of the New York State policy which the defendants argue should come into play because most of the debts occurred here. And when Congress enacts a piece of legislation, it is presumed to know what laws it will displace or affect.

The Second Circuit, when it was dealing with the Virgilio case cited to a comment by Senator McCain on September 21st, 2001 in which he addressed specifically the purpose of the federal legislation. The Congressional record of that day records that he said that the purpose of the stabilization act -- and this language is also cited in footnote 7 in Virgilio -- was, "to ensure that the victims and families of victims who were physically injured or killed on September 11th are compensated even if Courts determine that the airlines and any other potential corporate defendants are not liable for the harm; if insurance monies are exhausted or are consumed by massive punitive damages awards for attorneys fees.

The bill also creates a victims' compensation fund.

So, Senator McCain certainly knew that it was the purpose of the statute to allow people to recover punitive damages from the insurance policies if they were successful in

proving that claim at trial.

Now, Congress took another look at the ATSSA in November of 2001 when amendments were under consideration. When those amendments to the September 2001 legislation were on the floor, Representative John Conyers wanted the right to recover punitive damages stricken from the statute but he was unsuccessful and he made a long statement in support of his position which obviously did not carry.

Now, let's look at the statute itself.

THE COURT: What should I take from that?

MR. MOLLER: That Congress was aware that punitive damages would be claimed and would have to be paid from the only source available and that the attempt by Representative Conyers to have punitive damages dropped from the legislation was, simply, unsuccessful.

So, it endorses the original assistant that Senator McCain put on the table.

THE COURT: Suppose Congress felt that punitive damages would not likely be recovered.

MR. MOLLER: Well, Congress was guessing. But we don't know that that's part of the equation.

THE COURT: One minute. (Pause) Be back in a minute. (Pause)

THE COURT: Let's proceed.

MR. MOLLER: I wanted to make a point that what I

attributed to Congress was the flawed managements of the amendments position which Conyers proposed.

But, the point is that the effort to drop the punitive damages and the right to make a claim was defeated when the November amendments were under consideration.

I would like to look at the Act and follow the Court's suggestion of going to the source and figuring out what lessons could be learned from it.

First, the obvious purpose of the ATSSA statute is to protect the airline industry and not the insurance industry. It is worth repeating that this debate is about insurance and insurers trying to limit their exposure, and the aviation defendants, at the end of the day, really don't have a dog in this fight because their money is not at play.

Section 201(b)1 of the ATSSA -- and I thank my friend Mr. Barry for putting that into play -- the 201(b) says: Reimbursement of insurance cost increases. In general, the secretary may reimburse an air carrier for an increase in the cost of insurance with respect to a premium for coverage ending before October 1, 2002, against loss or damage arising out of any risk from the operation of an aircraft over the insurance premium that was in effect for a comparable operation during the period beginning September 4, 2001 and ending September 10, 2001.

I think that's relevant and is significant because it

recognizes that insurers are in the business of dealing with and accepting and adjusting to risk and the losses they choose to underwrite and the premiums they will charge.

Congress knew that there was a likelihood which happens to have eventuated that insurers would raise premiums and stepped in to protect the airlines. But the insurers' responsibility to pay the bill was limited only by subsequent sections of the act that we will address in a moment.

Second, Section 201(b)2 provides, and this I think very significant, that for acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism. And, the section goes on to provide that the government will, essentially, be an excess carrier above $100 million.

The last sentence in that paragraph reads: No punitive damages may be awarded against an air carrier parenthetically, or the government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act.

THE COURT: So, the argument is that by expressing the particular in a following catastrophe --

MR. MOLLER: That's correct.

THE COURT: -- by implication, the statute recognized

that punitive damages could be available, for instance on September 11th.

MR. MOLLER: Precisely.

But it is not only that Congress recognized that potential. It was recognizing and demonstrating its ability to deal with punitive damages for 9/11 events. Had they wanted to eliminate the right to recover and collect a punitive damages claim, the statute would have said so.

Then you go to Title IV, Victims' Compensation Fund. The Victims' Compensation Fund instructed the special master that, and this is in 405, "no punitive damages." The special master may not include amounts for punitive damages in any compensation paid under this title. Another obvious demonstration that punitive damages collectibility, recoverability, payment, was on the mind of Congress and they decided to foreclose the special master from making that kind of an award. But, it is most important for the state of mind of the Congress when it enacted ATSSA.

Now you get Section 408. 408(a)1, of course, provides the key language allowing recovery of compensatory and punitive damages provided that the recovery shall not be an amount greater than the limits of coverage.

I would like to focus on the specific language of that section and highlight a few words.

First, 408(a) says, notwithstanding any other

provision of law. Liability for all claims whether for compensatory or punitive damages arising from the terrorist related aircraft crashes of September 11th, 2001, against any air carrier shall not be an amount greater than the limits of coverage notwithstanding any other provision of law.

Those are not words to be disregarded. And, to the extent that New York policy is a reflection of a competing body of law, New York State is read out of the equation.

You go on, then, to -- I just want to put in a paragraph that picks up on 408(a). In the November 2001 legislation an amendment granted similar ATSSA protection to the City of New York. That became 408(a)(3). 408(a)(3) reads: Liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity arising from the terrorist-related aircraft crashes of September 11, 2001 against the City of New York, shall not exceed the greater of the city's insurance coverage or $350,000.

Now, a lawsuit against the City of New York would arise under New York Law. If they were going to limit punitive and compensatory damages to insurance coverage and not permit a victim or a damaged party from seeking the coverage, they would have been able to rely upon the New York policy and the language in (a)3 of insurance coverage would have been surplusage.

They obviously knew that somebody with a punitive

damages claim that was proved could go against the coverage.

THE COURT: What's the language in that amendment? Read it to me again.

MR. MOLLER: I will read first sentence: Liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity arising from the terrorist-related aircraft crashes of September 11, 2001 against the City of New York, shall not exceed the greater of the city's insurance coverage or $350,000.

Shall not exceed the greater of $350 million -- excuse me. $350 million.

So, there would have been no need for the reference to insurance coverage as a limitation if you couldn't get to it under New York Law.

Now 408(b)1 did several things. Let's go to 408(b)1. The availability of action. There shall exist a federal cause of action for damages arising out of the highjacking and subsequent crashes. And the section goes on to say: This cause of action shall be the exclusive remedy for such damages arising out of the highjacking and the subsequent crashes of such flights.

Collectibility of a punitive damages award is a remedy. And if you can't get it, then this statute means nothing.

THE COURT: Give me that again. I'm not following

this point.

MR. MOLLER: Section 408(b)1, federalized causes of action --

THE COURT: Right.

MR. MOLLER: -- and said that this cause of action shall be the exclusive remedy for such damages arising out of the highjacking.

THE COURT: Right.

MR. MOLLER: That does more than put the case into this Court. It means that the remedies here --

THE COURT: If federalizes the law, as Mr. Podesta said.

MR. MOLLER: If federalizes the law but then it is no longer state policy that would control the remedy. It is federal law that controls the remedy, at least to the extent of being able to collect a damages award.

THE COURT: What the federal law said is that as a matter of federal law we will look to state law if that state law is inconsistent with --

MR. MOLLER: Correct. And it is clearly inconsistent. Because what the federal law has done is it has said for federal policy reasons that we are not going to let you go into the tort feasor's treasury.

THE COURT: There is a bouncing back and forth which is why I had trouble understanding, but the federal law, as you

have compounded it, is open to the possibility of punitive damage recoveries under state law. And where there is a state law that disallows, arguably punitive damages recovery, your argument is that it is inconsistent with the federal law that allows for the possibility of punitive damage recovery.

MR. MOLLER: Close, but not quite. I'm saying it a little bit differently.

The states allow the recoverability of punitive damages, period. The second question is who do you get the money from? The state policy is you can't get it from an insurance company. The federal policy, we submit, is that you can get it from a insurance policy. Because once they eliminated the right to go -- once the federal government --

THE COURT: You are making it very difficult to deal with the situation because you don't really know all the time what is punitive and what is compensatory. And then you have problems of administration.

MR. MOLLER: That depends on the charge that you give the jury and how it responds on a verdict sheet.

THE COURT: But even if I had it on a verdict sheet you have different problems because you don't know when your recovery period of damages is unless you deal with it in the aggregate.

MR. MOLLER: I don't think that's a problem that defeats the argument that I am making.

THE COURT: All right.

MR. MOLLER: There are two things at play. Can I recover punitive damages and who pays them.

THE COURT: Mr. Moller, I follow you what you say. It is a very careful and very good statutory exposition. In looking at the statute, however, and having to administer it for some period of time, I have come to the view that punitive damage recovery could make it difficult for later recovering claims to recover. I therefore put the argument to Mr. Podesta that the overall statutory scheme may be inconsistent with any kind of an award that is not tied to compensation.

Under Supreme Court law *Phillip Morris v. Williams* and *BMW v. Gore*, it is clear that punitive damages have to do with defendants' conduct and not compensation of a plaintiff. And there is a factor that's introduced of harm of the reprehensibility of the defendant's conduct as it applies to a plaintiff.

Well, each of these plaintiffs were similarly situated in relation to the harm that was caused and the prospect of possibility is that earlier recoverers could recover punitive damages and later recoverers might not because they're all limited to insurance recoveries, not recover compensatory damages, which would be obnoxious.

MR. MOLLER: Well, you have -- you have heard that the property damage people are not pursuing punitive damages

claims.

The fact that there may be difficulty administering or coming to grips with the Supreme Court's view of how to treat punitive damages in Philip Morris v. Williams does not mitigate in favor of dismissing those claims.

I grant you --

THE COURT: Not the claim just -- yeah. Not the claims.

MR. MOLLER: If I have got a right to assert a claim, can prove it and win it but then can't collect the money -- that's not a claim.

THE COURT: Let's suppose Mr. Williamson, who has a very big claim for the World Trade Center is last in line, as he is likely to be, and let's say he recovers and there is no more money left. Now, we need not shed tears for the Port Authority and the World Trade Center properties but, in law, they have equal status to personal injury claims. And let's say there is no more money?

MR. MOLLER: I think the answer to that is if we are successful, as I think we would be in proving punitive damages for reasons I can go into but this is not a fact analysis, the award of punitive damages could be retained, could be held, could not be enforced until you get the answer to the other questions that you pose.

There is a practical way to deal with it but the

practical problems --

THE COURT: Gigantic escrow fund.

MR. MOLLER: Yes. So, put the rest of the money in escrow.

THE COURT: What do I do with settlements?

MR. MOLLER: People who settle give up their right to punitive damages because that's why they're settling if they want to stick around, which some of them do. Remember that the people who went into a litigation process did so for several reasons, and I believe that the least of them was money. One of them was the right to be able to prove their entitlement to punitive damages, the conduct of the defendant and to see that this doesn't happen again.

THE COURT: Mr. Migliori seems to object.

MR. MIGLIORI: No. No objection, just to buttress. That was also the purpose of the parties in Motley, having the bulk of the punitive claims left, presumably.

That was the purpose of the bifurcation stay that we entered into with the other parties, that the execution or collection of any such award would be held off until the end and we would not seek payment under that component. So as to allow --

THE COURT: I didn't sign that.

MR. MIGLIORI: I know that. And yesterday the Court ordered. But, I think it speaks directly to your question now

in terms of administration of this problem, at least on behalf of the 30 of the 30 plus of those claimants with punitive claims. We are saying we wouldn't seek that enforcement now and we would defer it until the very end on just punitives.

MR. MOLLER: So, I hope I have addressed that. There are practical problems that Williams v. Philip Morris and some of the other cases raise, but the practical problems are solvable but they don't mitigate so strongly that we should not be permitted to pursue the claims of punitive damages and worry about whether we collect a hundred cents on the dollar or somewhat less. It is a very important and significant distinction.

There was reference made to a stipulation but before I get to the stipulations, one other point. Congress passed legislation to support anti-terrorism by fostering effective technologies in November of 2002. In that statute 6, U.S.C. 442, Section B1, there is another declaration that addresses punitive damages and says: No punitive damages intended to punish or deter exemplary damages or other damages not intended to compensate a plaintiff for actual losses may be awarded, nor shall any party be liable for interest prior to judgment.

It is another expression of Congress that they knew how to deal with punitive damages and if they wanted, as a matter of federal policy, not to allow those damages, they knew how to do it.

I think it would be wrong to infer into the ATSSA a right to recover punitive damages which all of the relevant states here allow and then say, sorry, you can't collect them.

THE COURT: If I rule against the argument of presumption, what's your view of choice of law and other applicable state laws?

MR. MOLLER: I don't think there is a real significant choice of law issue. With respect to the interest analysis, the case states involved share the same analysis.

I don't believe there is any state in the country that is a higher interest than any other in deterring the conduct that led to 9/11, whether it is a manufacturing issue of Boeing or whether it is an operations issue of the airlines.

THE COURT: New York Law is set to have a limit that does not allow recovery that will come from an insurance company.

MR. MOLLER: That's correct.

THE COURT: And, let's say I don't accept your preemption argument; do you agree with that statement of New York Law?

MR. MOLLER: Yes. If I can't -- yes. New York Law does not allow me to recover damages from an insurance company.

THE COURT: Is the same law operative in the other states that are potentially appliable?

MR. MOLLER: There is a slight -- there is a nuance of

difference that you can recover punitive damages from insurance company for vicarious liability in Texas and New Jersey.

THE COURT: I don't think we have vicarious liability.

MR. MOLLER: To the extent that the airlines are responsible for what the security companies did you could classify that as vicarious but airlines have a direct and vicarious responsibility.

THE COURT: Vicarious requires non-involvement, complete passivity, and we don't have that.

MR. MOLLER: Okay. But you asked me the distinction. There are differences but I think basically the states involved would not allow recovery from an insurance policy.

Keep in mind that Argenbright has been read out of the ATSSA for purposes of the insulation of a liability cap, so that's a slightly different situation. But, yes --

THE COURT: By my ruling?

MR. MOLLER: No. The statute. There is a statute which cuts Argenbright out of the limitation of liability to insurance coverage. But, by and large, the states involved do not allow recovery from an insurance policy which is precisely why the glaring inconsistency exists between the ATSSA --

THE COURT: So, your argument that punitive damages are recoverable and the final analysis depends on a ruling that federal law preempts these.

MR. MOLLER: If it is stated that way I would prefer

that it be stated that there is an inconsistency --

THE COURT: Okay.

MR. MOLLER: -- with the two policies that state law says, no; federal law says, essentially, yes.

THE COURT: I follow. Okay.

Okay, thank you on that. Unless there is someone that needs a final word. I will reserve issue on the issue of punitive damages.

The last issue today is whether Pennsylvania law should apply to United Airlines flight 93 compensatory damage claims.

Mr. Ellis will argue for United Airlines and Mr. Motley here --

MR. ELSNER: I'm sorry, your Honor. Mr. Motley is ill so he has asked me to fill in.

THE COURT: Michael Elsner.

MR. ELSNER: Your Honor, the issue before us today is choice of law for Flight 93. Flight 93 took off from Newark, New Jersey and crashed in Pennsylvania, so under the ATSSA it instructs us to file following choice of law rules and subsequent law of Pennsylvania at the location of the crash.

Pennsylvania choice of law analysis follows a -- for torts, a government interest analysis and the significant relationship theory. And to do so it employed the restatement second of conflicts of laws.

As your Honor has previously ruled and as was affirmed by the Second Circuit in the GSI versus the Silverstein Properties case, the Court specifically considered whether the wrongful death and survival statute choice of law analysis in Pennsylvania should be governed by Pennsylvania law or some other law.

And you ruled, your Honor, and Second Circuit affirmed applying the restatement analysis, that the law that should govern should be Pennsylvania law. And the reason was two-fold. One was that there were several domiciles of the parties in that case and, as was cited by the Second Circuit, given possible compensations of potential litigation flowing from the crash of Flight 93, it makes sense to apply one set of law to the claims involved. Accordingly, deference to uniformity weighs in favor of Pennsylvania law versus German law.

And I think that the reasoning that you gave and the Second Circuit gave was strong and firm and should be followed.

If your Honor would like to hear additional argument on the other reasons, I'm happy to go forward.

THE COURT: What other arguments are implied?

MR. ELSNER: Well, one is whether a true conflict of law exists or a false conflict.

THE COURT: As among which states?

MR. ELSNER: Between Pennsylvania, New Jersey, and the

other domicile of the plaintiffs in the case, so that would include New York, New Jersey, Florida, California.

THE COURT: Well, perhaps I should let Mr. Ellis make his arguments and then we will see:

MR. ELLIS: It is a little unusual for me, Judge, to stand up here and listen to the plaintiffs argue in favor of preemptive scheme, but what they seem to be saying is that the statute, for the sake of uniformity, would require the law of one jurisdiction to apply for Flight 93. Well, if that preemptive scheme from ATSSA was to apply, then it would apply equally to Flight 175 and we would then be using New York Law to settle those cases or to try those cases.

And I can only indicate, your Honor, that throughout the course of this litigation when we have worked with you, Ms. Birnbaum and the plaintiffs' attorneys to try and assure some recovery for the individuals who lost their lives, we have been following the law of the domicile which is, ironically, with respect to Flight 93, what the Pennsylvania Supreme Court has held on two occasions to be applicable when an airplane crash occurs and it is labeled a fortuitous event.

The only exception to whether or not an event is fortuitous is if -- and this is the test that is set forth in the case law -- a party -- a party voluntarily and intentionally enters the state. They cite one case -- one case -- an automobile case --

THE COURT: What's your candidate for choice of law?

MR. ELLIS: Your Honor, it can either be New Jersey or it could be Illinois. Or, quite frankly, insofar as compensatory -- well, that's for conduct.

For compensatory damages, very simple. The law of the domicile. It is the law we have been following throughout this litigation process and to change it here is perplexing to say the least.

THE COURT: Mr. Elsner, why do you want Pennsylvania to reign supreme?

MR. ELSNER: The opinion, your Honor, is because in the cases cited by Mr. Ellis is that there is a strong and overwhelmingly significant interest that Pennsylvania law has.

THE COURT: What does Pennsylvania law provide that is particularly advantageous to your client?

MR. ELSNER: Pennsylvania law provides for a survival right of action which includes fright, terror damage, pre-impact damage. It also has a wrongful death law and the law of other jurisdiction. It provides loss of consortium, companionship, society and comfort.

It also allows the decedent estate to recover for loss of decedent gross earning power from the time of death through his estimated working life span.

THE COURT: The question I have is why, in this kind of a tragic situation, we should favor Pennsylvania law just

because the crash occurred in the Shanksville Field? The plane was destined for Washington. The plane originally was destined for some place on the west coast. People boarded, I guess, for San Francisco. People boarded in Newark. They could have come from New York, they could have come from Pennsylvania.

MR. ELSNER: I don't think you should, your Honor. Pennsylvania law rejected applying the location of the crash site itself as the only indicating factor. They rejected that.

What it said was let's look at it a little more broadly. There is a presumption under Pennsylvania law that will look at the site of the injury but that's not the only analysis.

THE COURT: Those are probably automobile cases.

MR. ELSNER: There are automobile cases but even the aviation cases, when you take a step back and when you look at what Pennsylvania's policy is, Pennsylvania's strong and overwhelming policy is to provide full and complete damage remedies to victims of torts that occur within Pennsylvania.

And, when you look at the seminal case on this issue which is cited by the defendants, it is an aviation case, it was a case in which there were Pennsylvania residents and they crashed in Colorado. And what the Court said was that in the face of a hundred years of applying the site of the location itself, we think that Pennsylvania's law concerning damages and our interest in fully compensating plaintiffs is so great that

we are willing to overturn a 100-year history in order to protect that significant interest. And that's a different policy than many other states have.

And the point is, is it a true conflict or a false conflict? A conflict only exists if the law of another state is prejudiced. Counsel has not identified any significant interest that New Jersey has.

THE COURT: I can't make that decision then unless I have the specific plaintiffs in mind.

MR. ELSNER: And we have them. There are seven plaintiffs who have claims that are pending from Flight 93, two reside in New Jersey, two -- I'm sorry -- three reside in New Jersey, two reside in California, one resides in Florida and one resides in New York.

THE COURT: Three in New Jersey. How many in California?

MR. ELSNER: Two in California.

THE COURT: One in Florida and one in New York?

MR. ELSNER: That's right.

THE COURT: Is there no differences among those states?

MR. ELSNER: Yes, there are differences.

The damages law of Pennsylvania provides a greater remedy in every circumstance than the law of those other jurisdictions.

But, what interest does the domicile state have in the application of the wrongful death and survival statutes? The only interest that the domicile state has is the proper administration of a decedent's estate.

The only interest that New Jersey would have would be conduct based. And so, the analysis leads us back to when we step back and we look at all the analysis we say, Well, what has the most significant relationship to this issue? And the most significant interest here which has been expressed in every single case --

THE COURT: I can't see any real interest in Pennsylvania except that it was the unlucky place where some great people died.

MR. ELSNER: Well, the second point I make, your Honor, is that it wasn't just fortuitous that the plane crashed in Pennsylvania. The passengers on that flight took a different course of action.

THE COURT: You don't know when they started to take that course of action?

MR. ELSNER: They started that course of action over Pennsylvania.

THE COURT: You don't know that. Nobody knows that.

MR. ELSNER: Well, your Honor.

THE COURT: Where did the plane turn around? Over what city?

MR. ELSNER: The flight turned around in Ohio after it was highjacked. We know from Cleveland Air Traffic control that they heard the highjackers crashing through the cockpit. We know from phone calls from passengers on board, including phone call from Tom Burnett, who learned while he was in Pennsylvania -- he didn't know he was in Pennsylvania -- but, we know from the air traffic control diagrams provided by the government where the plane was at different times that he learned the fact that planes had been highjacked and flown into the World Trade Center while in Pennsylvania.

THE COURT: Pennsylvania was the largest state so the most geography in that route but it still was fortuitous.

MR. ELSNER: And no state has an interest in limiting the recovery of any of these plaintiffs.

THE COURT: You know, the conduct regulating was probably federal. The place -- the jurisdiction which had the greatest interest in regulating conduct, in my judgment, was federal, which accidents have a conflicts of law rule here. The interest of New York, Florida, California and New Jersey were just as tangential as Pennsylvania.

MR. ELSNER: I'm not an expert in this area and I'm just filling in, your Honor.

THE COURT: I know.

MR. ELSNER: But my understanding of federal common law is you look to sources of law including the restatement.

THE COURT: I know.

MR. ELSNER: And the restatement here says that we will look at a significant, what state has the most significant interest. And the presumption would be the site of the injury.

THE COURT: I think there would be a federal interest under the ATSSA, although there may not be any sources to support my view that outliers in the states would not be recognized and that a normal distribution rule, I think the other states have pretty much the same kinds of rules would probably be the better ruling decision. Whether that view is supported in classic conflicts theory, I don't know.

I know Judge Weinstein had the notion that there should be federal common law in the Agent Orange case and the Second Circuit disagreed.

MR. ELSNER: Your Honor, if Congress wanted to do that, they could have.

THE COURT: That's true with a lot of things.

MR. ELSNER: Apply substantive law and choice of law rules by the states where the cashes occur.

THE COURT: All right, gentlemen. Anything more.

MR. ELLIS: I don't think so.

THE COURT: Thank you very much. Decision is reserved on this decision as well.

Let's talk about going forward while I have your attention. And Mr. Migliori may want to comment because the

view was expressed by him earlier.

I have been thinking about how to handle this case -- this set of cases. It is the same view I have of other cases as well.

We are now going into close to the end of the sixth year since the tragic events of September 11, 2001. Lives have changed, children have grown up, widows and widowers have remarried. Some have gone on with their lives. Some remain substantially immobilized by the emotional loss that was suffered on September 11. It is time to break the impasse.

I have been looking, with a great deal of favor, that the settlements that have occurred in this case. And Mr. Barry's latest report of five additional cases that are settled is extremely welcomed.

In Flight 11, 22 cases have settled, five remain pending including two ground claims.

In Flight 77, 16 have settled and 15 remain pending including eight ground claims.

In Flight 175, nine have settled, 10 remain pending.

In Flight 93, seven have settled, seven remain pending.

There are four personal injury claimants in the World Trade Center as well. I think we may not be at the end of settlements but they're getting more difficult. And so, I think that the thought that these cases will be resolved by

settlements has become more romantic than previously. So, I look to what remains possible in the resolution of these cases. Even with the denial of the defendants' desire for additional discovery, a great deal of discovery remains open. And it would seem to me as a very rough guess that a year or two could easily be consumed as we get into some knotty questions of security, longer.

So, I don't have any sense of optimism that I can try the whole case and the assignment of a trial date would not be very useful given this uncertainty.

(Continued on next page)

THE COURT: I believe counsel have been working hard and they don't need as a goad the fixing of an arbitrary trial date which would have to be continuously adjourned in light of difficulties in the discovery process. I have to remember that in back of the personal injury claims there are property claims. There has not been a willingness on the part of the defendants to deal with these property claims in a settlement mode. I do not say this critically; I say this recognizing the facts.

We thought long and hard on how to approach this very difficult problem. What seems to be open is to obtain a value for the cases through jury decisions that in turn I believe will assist settlements. The discovery of issues of value either have been completed or can quickly become completed. Where they have not been completed, it is possible to identify cases that can be put up for early trial so that the attorneys can complete their discovery. The trials will be short, relatively, and manageable and I think of substantial utility.

So I thought it might be a wise course to begin trials of some of these cases as early as July. We can do one, two, three trials and see what that does in the way of additional settlements. I believe there is great value in settlements because people are assigning values themselves. I think in many respects that's a fairer way of approaching the proposition of compensation for loss than particular jury

trials and jury verdicts.

So I thought we would try very hard to resolve the decisions on which I reserved in a very short time, perhaps set June 25 at 4:00 as a time for our next meeting to discuss how we would proceed. Either then or prior to that, we could identify one, two, or three cases for damages trials.

What do you think.

MR. MIGLIORE: Thank you, your Honor. Just to bring the court up to date a little bit. We did on behalf of our flight 175 clients provide United and Huntley, those defendants, additional information towards resolution. And just so the court doesn't believe that all is romantic, there are in fact some actions and activity going on with respect to still trying to resolve some cases. All is not completely lost. We have been waiting about a month for a response to our last foray.

That said, it's not a surprise to this court to hear me say and to hear our clients directly say when the court was involved with mediation that a lot of this has to do for them with accountability and not compensation. I know the court's response to our clients when they have said that, but I can tell you that the idea that a client would be asked to try a case only as to damage without that other component which motivated most and to some extent all of our clients to opt out of the fund and seek accountability as a component.

THE COURT: Nothing prevents them from waiting around.

MR. MIGLIORE: When the court said that it was considering --

THE COURT: I could try damages, a jury could deliver a verdict and if the client wishes to proceed and test liability, they can do that.

MR. MIGLIORE: This just happened to me in a case; I just finished a trial this week unsuccessfully I report. The defendants in that case tried to sterilize my case on certain medical causation issues. They signed a unilateral stipulation saying they will not contest a certain component. The trial judge in state court said it's the plaintiff's right to give the context to its claim for damages so if the plaintiff still wants to put those experts on the stand to explain causation for whatever reasons, he or she should be allowed to.

The idea of sterilizing these damages claims by removing from it all facts is problematic. That said, there may be some clients of our 30 some-odd clients remaining who may have a different level of concern about that piece or they may be voluntarily willing to take on a damage-first bifurcation. If the court is leaning that way, my request would be simply that the court not pick those cases, that the court allow us to identify cases in our group of cases where that model may not be against their wishes, may not be against what they had hoped would be their day in court.

So it's a way of saying outright the accountability factor is important to all our clients and sterilizing a damages-only trial would necessarily be against why our clients chose this long route.

THE COURT: I would be wanting to assign cases that would appear to me to have a representative quality to them.

MR. MIGLIORE: I would suggest maybe we give the court five examples from which it can choose but at least allow us the opportunity to talk to our clients and say would this be something that you would do willingly. Because I can tell you, I know the court has met in this mediation process clients of ours that if they were forced to do this, they would do it very, very unwillingly.

THE COURT: It's mixed impressions that come out of this, Mr. Migliori. My impression is that clients that enter the process were willing to compromise but their numbers of compromise were higher than that which was available and so questions of principle often occluded. It's like a client who comes to the lawyer and says, look, this is a question of principle, I want you to go all the way, principle is what counts, then the lawyer sends his first bill, and all of a sudden there is no longer a principle, he settles.

MR. MIGLIORE: We don't bill on our side of the table. I appreciate that. I can't separate out, none of the three major reasons why plaintiffs sued are distinguishable; they

necessarily overlap.

THE COURT: I understand.

MR. MIGLIORE: I would ask your Honor that we at least be allowed to focus, especially since this is a test plan, that we at least be able to identify those plaintiffs that may be very willing to do that, given where they are in this process, the fatigue that they may feel as a result of this process, the closure if there is any for them in this process.

THE COURT: I don't mind your making recommendations, but I am going to reserve freedom of action, because if I am going to do this, I want the maximum utility out of it.

Mr. Barry.

MR. BARRY: Thank you, your Honor. I must admit we have discussed this among the defendants ourselves as to whether or not this is a course of action that we think would be beneficial to your Honor, to the parties, to achieve more settlements. At the moment, we are not of one mind on that, I can report to you, as to whether or not it would be beneficial or that all of the defendants are willing to go through that process. It's still under consideration.

I will tell you this, that I don't think July trial dates is realistic at all even if we were to proceed with the damages only, because we have not really conducted formal discovery in any of these cases. We have gone along with what plaintiffs have given to us in damages.

THE COURT: A very good reason to start doing it. This is not going to be meet up with SSI problems.

MR. BARRY: That's for sure, but it is going to take time. It's something we have to discuss between now and June 25 when we met again. I don't think the issue, however, your Honor --

THE COURT: I have some long criminal trials coming up in the fall. I can't predict my trial schedule completely. I don't set up trial dates until people are ready. So I find that I can try cases when I need to try cases. But I have some long trials coming up. It's time, you know, five and a half years, it's a long time. I don't like it; it makes me uncomfortable. I want to see these cases disposed of. Many are being disposed of in the best way possible. But you know, it's getting harder and harder.

MR. BARRY: I think more will be disposed of.

THE COURT: I am sure, but it's getting harder and harder. It takes longer each time. The ripe fruit has been plucked.

MR. BARRY: I will tell you it is not a question of what is the reasonable value of these cases. Every lawyer in this room, plaintiff or defense lawyer, knows what these cases are worth. That's not the issue. The issue is what was stated by Mr. Migliori.

THE COURT: They know differently.

MR. BARRY: No. I think there is an issue with many of the plaintiffs that they want to get their day in court as to liability. They want accountability and responsibility.

THE COURT: I have seen enough to know that there are different conceptions of value.

MR. BARRY: I am not sure you are going to accomplish the goal you are setting out to accomplish by doing this. You may. I have been down this road before in many other cases. And in the normal case, the normal air crash case, it has worked, if there has been an issue; a couple of cases were tried, the rest settled. I am very concerned about the fact that this is the 9/11 case and what sort of publicity would come out of it, what sort of message would be given if the defendants were to stand up and say we do not contest liability, because that's the only way that the case can be tried on damages.

THE COURT: Why.

MR. BARRY: We would have to agree, if you are going to have a verdict entered against the defendants in an amount of money and a judgment entered --

THE COURT: The judgment then would be entered and it would be a provisional judgment. You would be able to retain your right to contest liability. If liability is tried and proved, the damages would be fixed.

MR. BARRY: So what does that accomplish.

THE COURT: It fixes the value. It gives the most important consideration of value it could be, and that's a verdict of a jury.

MR. BARRY: Let us talk about it amongst ourselves and we will be ready to report back to you on the 25th, but I will tell you that, I can only repeat, everybody here knows the value of these cases and what an appellate court would sustain under the damage facts.

THE COURT: I disagree.

MR. MIGLIORE: I do too. We definitely have a difference of opinion about that.

THE COURT: I don't need any testimony. I get involved in the process. I can see the process. I know the process. I know the conceptions. How could there be a difference. So long as you have concepts that are as elusive as you do in the compensation of a plaintiff in a tort case, you have wide varieties of possibilities. A value has arisen in terms of cases that have settled. I have been very strong in my expressions in terms of not favoring early settlers against later settlers and vice versa. There has been a rough consistency but not everybody has to agree to that consistency.

I will not criticize a lawyer who thinks that he or she can get more for his client by waiting or doing more or doing differently or arguing differently

MR. BARRY: I don't think that those lawyers who think

they are going to get more are the ones that are going to agree to a damages-only trial in the sterile atmosphere Mr. Migliori is talking about because it will have to be sterile.

THE COURT: If I have discretion, it doesn't make a difference if they agree or not, right.

MR. BARRY: I don't know whether you have discretion to tell you the truth to order somebody to proceed with a damages-only trial.

THE COURT: If I order such a trial someone is going to have to bring a motion and I will have to decide the motion. It may go up to the Court of Appeals by *mandamus* perhaps. This will not be the first time in these case that that will happen, probably not the last.

MR. MIGLIORE: Your Honor, what I would like to do if it's welcome by the court, I would like to submit a list of what we think are representative claims. I assume we are talking about single non-dependent issues.

THE COURT: Probably. Ms. Birnbaum has worked very effectively; everybody agrees to that. It will be good for both sides to discuss this idea with her and see if you can identify appropriate cases. To do it by consent is much more valuable than if I have to do it by decision.

MR. MIGLIORE: There are issues with those that have preimpact fear claims, those that don't. There will be a need for discovery of, for example, an expert who can testify about

what happens in that period of time. I can tell you there is a lot that still has to be revolved. If the court is inclined to do this, we will do everything we can and would like to get that trial as soon as possible.

THE COURT: Mr. Migliori, I want to resolve as many cases as I can as early as I can. That's my job. For many people, justice delayed is justice denied. For anyone, justice delayed is justice denied. No matter how people want an accounting, people are impatient, and it's five and more years, and it's too much time.

MR. MIGLIORE: I am agreeing. If the court is going to exercise its discretion to do this, we would rather do it this summer. We agree with the court.

THE COURT: Talk together, talk with Ms. Birnbaum, and I will have a report on June 25 at 4:00.

Thank you very much. It's been a wonderful day, it was very interesting, and I compliment all of you who have argued excellent arguments.

- - -